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AND
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CONVEYANCER'S NOTEBOOK.

We would wish to take this opportunity of apologising to our subscribers for some irregularity in the issue of this journal. Those subscribers who have experience of the difficulties in connection with printing will realise that it is not the fault of the publishers, nor indeed should blame be put upon anyone or thing but the intractability of circumstances. We are doing our utmost to achieve greater promptitude, but it is extremely difficult to avoid undue delay in producing topical matters such as notes of cases.

Land and civil aviation.—The Civil Aviation Act, 1946, confers considerable powers upon the Minister and adds further complications to the land law. Primarily these powers are for acquisition of land and restriction of user.

Apparently, acquisition, whether compulsory or by agreement, is contemplated as arising from grant. *Probably*, restriction of user will normally be achieved through order. This would, in some respects, have resulted in a relatively simple scheme and at least avoid some of the complications to be noted. But simplicity in the land law is not a matter of interest to our legislators at present, or at least so it would seem.

By section 26 the Minister has power compulsorily to acquire land for any purpose connected with the discharge of his functions and the provisions of the Acquisition of Land Act, 1946 (noted *ante*, vol. 10, p. 186), are applied. " Land " is defined as " any estate or other interest in land and any easement " (section 51); easement is not defined. Section 26 contains one other provision that is important and difficult. Under sub-section (6) when a person grants or agrees to grant any right (whether in perpetuity or for any other period and whether or not capable of subsisting as a legal estate) such grant or agreement shall operate to bind all successors in title *notwithstanding* that it would not have been binding apart from the sub-section. The right must be " in or in relation to land (including a right to enter upon that land, a right to carry out and maintain works on that land, a right to instal or maintain structures or apparatus on, under, over or

across that land and a right restrictive of the user of that land)". It is pretty plain that this provision is intended to include (a) equitable interests such as restrictive covenants independently of registration under the Land Charges Act, and (b) licences which were not enforceable against successors in title: *Hill* v. *Tupper*, 2 H. & C. 121. But what is not, perhaps, equally clear is what licences would be regarded as within the scope of the sub-section. It is submitted that such licences cannot be *compulsorily* acquired because they are not land within the definition. But what is their precise position now, and must every conveyance be made subject to such licences or the vendor be in danger on his covenants for title? We think the answer is "Yes". We think, also, that all such rights must be disclosed in the contract. Perhaps, in parenthesis, we may be allowed to observe that the expression "grants or agrees to grant" is peculiarly unhappy in relation to rights not lying in grant at common law where the principal subject-matter relates to estates and interests in land. We hope that we are not being pedantic if we suggest that legislation relating to the land law should, so far as is reasonably possible, employ the technical language of that highly elaborated but clearly defined branch of the law. We could, of course, argue that in the land law a licence is not a grant and that, therefore, no person can grant or agree to grant it notwithstanding the language sometimes used in precedents.

It will be observed that the Minister is put above the Land Charges Act, but we fail to see why this should be necessary. It is the more peculiar because where the alternative method of order is used, such order must be registered as a land charge "as soon as may be" after the order becomes operative (section 45) with no provision made for the effect of the non-registration of such order. This clause is becoming common form and it is time the profession took up the matter. If the order is to be registered, it should be void against a purchaser for non-registration.

In the meantime it becomes necessary in all inquiries preliminary to contract to inquire "whether there are any grants or agreements to grant any rights or interests relating to the land and binding upon successors in title thereto under the Civil Aviation Act, 1945".

The Minister's powers to make orders affecting the land generally depend upon the requirement "if he is satisfied that it is expedient", etc. There is nothing to show how the Court could test whether he is satisfied, yet the power to appeal to the Court against an order (the time limit is *six weeks* from publication of the notice of the order) must be on the ground *either* that it is not within the powers of the Minister *or* that any requirement of this Act has not been complied with: Schedule III, Part II, para. 6. It is quite clear that unless he *is* satisfied the order is *ultra vires*. Actually, the Court can only quash the order if *either* it is not within the Minister's powers *or* the interests of the applicant have been substantially prejudiced by any requirement of the Act not having been complied with. Indeed, the way of the objector is hard.

Under section 27 the Minister may by order provide "for the creation in his favour of easements over land or of other rights in or in relation to land, including rights to carry out and maintain works on any land and to instal and maintain structures and apparatus on,

under, over or across land ". This will carry with it incidental rights of entry, etc. The law of fixtures is excluded by sub-section (5), and so long as the order is in force no person can interfere with any works, etc., except with the consent of the Minister. Compensation is payable under the Acquisition of Land Act, 1919.

Under section 29 a different procedure is given for general control of land, presumably in the area of an aerodrome. Here the order prescribes the area of land. Then by special or general authority given in the order the Minister may direct a number of things set out in the section : these are essentially total or partial demolition of buildings or structures, restricting the height of trees or cutting them down, extinguishing private rights of way (section 28 deals elaborately with highways), and restricting or extinguishing the right to make or keep installations of " cables, mains, pipes, wires or other apparatus ". There are, of course, consequential provisions. The section contains no provision for compensation, but these are contained in the Fourth Schedule though too elaborate for comment here. We may refer to the general provisions for alternative accommodation contained in section 32. This primarily relates to *residential* accommodation, our urban legislators rarely considering the vital problems of land to farmers. There is provision for paying compensation for loss of " business " carried on in a building, but perhaps a farm is a " profession " or compensation is obtainable in some other way. Or perhaps our legislators still think that a farmer can obtain a farm whenever he wants it and it is immaterial where it is situate.

Under section 37 the Minister may by order " impose such prohibitions or restrictions on the use of any area of land or water as a place for the arrival and departure of civil aircraft as he thinks expedient for the purpose of securing that aircraft may arrive and depart with safety at any aerodrome vested in him. . . ". This is not very easy to construe, but presumably it is intended to apply to land beyond the aerodrome vested in him and not intended to be places where aircraft normally land or take off, but where they may require special flying conditions. It operates only to confer powers of prohibition of user and does not, apparently, authorise any actual interference. Again, compensation is provided for in the Third Schedule.

These orders, or at least the orders under sections 27 and 37 by the Third Schedule and the directions under section 29 by the Fourth Schedule can only come into operation after notice has been served on every " owner, lessee and occupier of any land " affected. Owner is defined (section 51) as a person, other than a mortgagee not in possession, " who is for the time being entitled to dispose of the fee simple of the land, *whether in possession or in reversion*, and includes also a person holding or entitled to the rents and profits of the land under a lease or agreement, the unexpired term whereof exceeds three years ". Since, presumably, an order could be quashed for invalidity on the ground that such notice was not given *provided* the interests of the applicant have been substantially prejudiced it may be necessary to consider this definition. It is obviously unfortunate in connection with the necessity for notice. It clearly includes persons entitled only to an equitable interest, since an agreement giving title to receive rents and profits for

a period exceeding three years would presumably be an agreement for a lease operating in equity. Likewise a fee simple in reversion (as distinct from a fee simple in possession) must be equitable. No doubt the draftsman had in mind a fee simple subject to a lease, but this is a fee simple in possession and any argument based on the notion that a legal owner is obviously intended is, in our submission, put out of Court by the agreement to exceed three years. Under a strict settlement, therefore, presumably notice must be served both on the estate owner in fee simple and the ultimate person entitled in fee simple save, perhaps, where he is a remainderman. An equitable owner is always entitled in equity to dispose of his fee. The situation is absurd and simply due to the failure to apply elementary rules of real property to the drafting of the statute.

But notice must also be served on any person who has any legal or equitable interest in the land, *e.g.*, presumably a person having the ownership of restrictive covenants, provided the interest extends to the equivalent of a fee simple or a term of years exceeding three. At least this is presumably the result arising from the definition of "land" (section 51) which includes any interest in land and any easement. We doubt whether land was intended in this sense in the Schedules, but it is to be observed that owner is not limited to a person entitled to dispose of an "estate in fee simple in the land" but of "the fee simple of the land", *i.e.*, the fee simple of "any estate or other interest in land and any easement".

In these circumstances the word "lessee" enumerated among the persons entitled to notice has not a great part to play we feel. A lessee without three years to run and not in occupation is not likely to be affected very much. With regard to "occupier" this word is also likely to cause difficulty.

Assents.—With regard to the paragraph under this heading at p. 2 of this volume a learned correspondent writes to point out that under the Administration of Estates Act, 1925, s. 45, a spouse is not entitled to more than a charge of £1,000 upon the property of an intestate. Consequently, where the total value of the property does not exceed £1,000 and includes land this still does not confer ownership of the land upon the spouse but only a charge. Furthermore, the right to appropriate does not appear to apply since of course an administrator may not buy the property of the estate and there is no authority for saying that he can appropriate, which is, for some purposes at least, treated as a transaction for value.

Furthermore, as the learned correspondent points out, there is no certainty that the estate may not be enriched by some property falling in at a later date. In which circumstances other persons interested under section 45 might query the validity of the spouse treating the land as his own and not merely subject to the charge. This would treat the administration as incomplete and with the present rise in prices of the value of land difficulties would occur on the question of distribution between the persons entitled on distribution.

So far as a purchaser is concerned a title made by a properly

constituted personal representative would be valid. The case, the subject of the previous note, was one in which the administrator was dead and the design was to avoid taking out a grant *de bonis non*. Here the difficulty occurs in an acute form.

The view thus expressed gives rise to a serious problem because the statutory trust for sale does not arise until after the estate has been cleared: *Re Yerburgh*, [1928] W. N. 208. Nevertheless, it seems to have been held in *Re Pitt*, 44 T. L. R. 371, that if all the debts, etc., have been paid the estate is cleared for the purpose of the statutory trust for sale and that trustees for sale can be appointed. Of course the statutory trusts for sale include the charge, but the argument seems to go round in a circle. The point is that this doubt adds emphasis to the desirability of not going beyond the statutory trust for sale on the legal title and maintaining it for the benefit of a future purchaser. If the property is sold the problem of the proper distribution of any sum in excess of the total of £1,000 remains.

SETTLEMENTS TO AVOID INCOME TAX.

By E. H. Bodkin, Barrister-at-Law.

A Precedent of a voluntary settlement to avoid income tax and surtax was given on p. 260 of Vol. 10 of *The Conveyancer*, which has given rise to several queries by subscribers as to the validity and effect of such settlements. Some further Precedents of such settlements adapted to cover section 27 of the Finance Act, 1946, will be found in the present number of *The Conveyancer*. The settlement of funds on children has become a well-recognised method of avoiding income tax and surtax, and, provided certain conditions are fulfilled, the result is to prevent the income of the settled funds being treated as the settlor's income.

The pitfalls encountered in drafting such settlements, however, are many; Clauson, L.J., in *Inland Revenue Commissioners* v. *Gaunt*, [1941] 1 K. B. at p. 713, remarked on the extreme complexity of the highly artificial series of sections in the relevant Finance Acts. It may be argued also that these Acts go further in this respect than is necessary to prevent the evil against which they are directed: if evasion is intended, it will be carried out whatever the form of settlement, and it is unfair to penalise a *bona fide* settlor who does not intend to obtain any personal benefit from the settled funds. It is, *e.g.*, impossible to make a settlement under which future children are to take interests in the capital without the settlor running the risk of being assessed for income tax on the whole amount of income accumulated during their minorities; the reason being that to avoid this result it would be necessary to make the capital and accumulations vest at twenty-two, thereby infringing the rule against perpetuities.

The first point to be noted in drafting such settlements is that income paid to or for the benefit of a child in any year of assessment at the commencement of which it is an infant and unmarried will under section 21 (1) of the Finance Act, 1936, be treated as the settlor's

income for tax purposes. "Child" for this purpose includes a step-child, an adopted child and an illegitimate child. A grandchild or any remoter issue is not included; but it may nevertheless be necessary to consider the effect of the Finance Act, 1938, on accumulations for their benefit. The result is the same whether the income is applied under an express trust or power or under the statutory power of maintenance; it cannot be avoided where income is actually paid or applied. Provided, however, the settlement is "irrevocable" in the special sense given to that term in the Finance Act, 1936, advances of capital will not be treated as income for this purpose, as they might otherwise be under section 21 (2) (b). Income accumulated under a trust or power is not in general to be deemed as applied for the benefit of a child; but it is usually preferable not to declare an express trust for accumulation but to give the trustees a power of maintenance. If the settlor's income is sufficient it will not in fact be necessary for them to resort to the power, and the income will not fall to be treated as his income. Whether or not the child is a year old or more at the date of the settlement, it will not be sufficient for the above purpose if the power of accumulation continues for the statutory period of the child's minority inasmuch as the financial year which commences before the child's twenty-first birthday will terminate more than twenty-one years after the expiration of such period. It was for this reason that the period of accumulation in the Precedent referred to was limited by reference to the settlor's life, as permitted by section 164 of the Law of Property Act, 1925. An express power to accumulate is required, since under section 31 of the Trustee Act, 1925, the income would otherwise be payable to the child after attaining twenty-one, even if its interest did not vest until a later age.

It must be borne in mind that even if the income is accumulated, the accumulations will be deemed for the purpose of section 21 to be paid to or for the benefit of the child at the date when he becomes absolutely entitled to them, and the whole will be treated as the settlor's income for the financial year in which the child's interest vests if at the commencement of such year he be an infant and unmarried. This may obviously be a serious matter, as the accumulations may equal or even exceed the settlor's actual income for that year; he will, however, have a right of recourse to the trustees of the settlements for the tax charged. The difficulty arises whenever the child has a vested interest in the income and there is no express provision that accumulations are to be an accretion to capital so as to exclude section 31 (2) (i) (a) of the Trustee Act, 1925, or when it has a contingent or vested interest in a specified share of capital; but it will not occur if the child has only an interest in the income produced by the accumulations, as in the Precedent referred to. When the child takes an interest in capital, the vesting should therefore be postponed until the age of twenty-two, the power of accumulation being also continued until then. This device is effective in the case of the ordinary settlement of investments. But if sums are payable to the trustees which are deductible in computing the settlor's total income for tax purposes, *e.g.*, under a covenant to pay an annual sum (as to which see *Hood-Barrs* v. *Inland Revenue Commissioners*, [1945] 1 A. E. R. 500) these will, notwithstanding postponement of the vesting, be treated

as his income. And it will also be useless to postpone the vesting unless the settlement is also "irrevocable", since under a revocable settlement section 21 applies to accumulations to which the child may become entitled on any contingency.

It is necessary next to refer to the definition of an "irrevocable" settlement. This definition proceeds on the curious method of first setting out the conditions under which a settlement is not irrevocable, followed by a proviso detailing those which will not of themselves render it revocable.

It will not be irrevocable if it provides "for the payment to the settlor, or, during the life of the settlor to the wife or husband of the settlor for his or her benefit, or for the application for the benefit of the settlor or, during the life of the settlor, of the wife or husband of the settlor, of any income or assets in any circumstances whatsoever during the life of any child of the settlor to or for the benefit of whom any income, or assets representing it, is or are or may be payable or applicable by virtue or in consequence of the settlement". It will also not be irrevocable if it provides for the determination of the settlement by the act or default of any person (unless the determination will not during the life of such child as aforesaid benefit any person other than the child or his or her wife, husband or issue), or for the payment of any penalty in the event of the settlor not complying with its terms.

But the settlement will not be revocable by reason only that it directs income to be held on the statutory protective trusts for a child, unless the trust is for a period less than its life or the settlement specifies some event on which the child would be deprived of the right to receive the income; or, again, if the income or assets are applicable for the benefit of the settlor or his or her wife or husband only on the bankruptcy of, or an assignment or charge by, the child.

It is necessary to bear in mind that though an ultimate trust for the settlor will not under the usual form of settlement make the settlement revocable, if such a trust is inserted he may be included in the class of persons in whose favour the discretionary trusts which arise on forfeiture under the statutory protective trusts for the benefit of a child are exercisable. If this be so, the settlement will not be irrevocable unless the trusts are for the whole life of the child: *Inland Revenue Commissioners* v. *Lord Delamere*, [1939] 2 K. B. 667. Consequently it may, as in the Precedent referred to, be necessary to exclude him expressly from that class; and the same applies to express protective trusts.

The reservation of any interest to the settlor must not be made without careful consideration. In addition to the question of whether such an interest will make the settlement revocable, section 38 of the Finance Act, 1938, provides that if and so long as the settlor has such an interest in any income or property arising under or comprised in the settlement as is defined in the Act, any income arising during his life will, so far as not distributed, be treated as his income. The definition of "interest" under this Act is exceedingly wide. The settlor is deemed to have such an interest "if any income or property which may at any time arise under, or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances

whatsoever ". Two things especially require special notice. First, the provision is irrespective of whether infant children are interested under the settlement. Secondly, the possible payment to the settlor's wife or husband is not limited to the settlor's life. Accordingly " wife " has been held to include widow, and " husband " a possible future husband: *Inland Revenue Commissioners* v. *Gaunt*, *supra*, *Tenant* v. *Inland Revenue Commissioners* (1942), 167 L. T. 159. In the former case Lawrence, J. (as he then was) held that neither a general power of appointment by will conferred on the settlor by the settlement nor a resulting trust to his estate after his death would give him an " interest ". The Court of Appeal affirmed the decision on other grounds and expressed no opinion on these points, but their reasoning would appear to render it doubtful whether the decision of the learned Judge could in that respect be supported. Even a power to the trustees to pay off loans out of income may be enough to give the settlor an " interest " if money has been actually advanced by him, though it will not make the settlement revocable: *Jenkins* v. *Inland Revenue Commissioners* (1944), 171 L. T. 355.

The settlor is not, however, deemed to have an " interest " if the income or property is only payable to him or his wife on (1) the bankruptcy of, or assignment or charge by, a beneficiary who is or may become entitled to the income or property; (2) the death under twenty-five or some lower age of a beneficiary who would become entitled thereto on attaining that age; or (3) if and so long as some person is alive and under twenty-five during whose life it cannot become so payable except on the bankruptcy of, or assignment or charge by, the beneficiary.

Under section 27 of the Finance Act, 1946, income will be treated as the settlor's income for surtax purposes during his life unless it is payable to an individual for his own use and benefit, or is applicable for the benefit of individuals (other than his solicitor or agent) named in that behalf in the settlement or their children, or the settlor has absolutely divested himself of the property by the settlement. The latter expression includes exceptions (1) and (2) above.

An ultimate trust on failure of issue of a child under which the settlor or his wife may benefit will thus usually not give him an " interest " during the child's minority or before it attains twenty-five, or bring section 27 of the Act of 1946 into operation, but any discretionary trust should be confined to named beneficiaries or their children and there should be no power of accumulation. A forfeiture clause should conform to the first exception in section 38 of the Finance Act, 1938, and there should be no ultimate trust for the settlor. The fact of the settlor having an " interest " is not, however, of importance except as regards surtax if all the income is in fact distributed. Even under the statutory protective trusts, however, the whole income is not necessarily in all circumstances to be applied for the beneficiaries: *Re Gourju*, [1943] Ch. 25; *Re Peel*, [1936] Ch. 161.

The statutory trusts are not confined to the children of named individuals within the Act of 1946. Further it would appear that they do not fall within the excepted case where the income cannot be paid to the settlor except on bankruptcy, assignment or charge; the forfeiture provisions of the protective trusts are wider, and it cannot

be assumed that the settlor would be protected if he were a possible beneficiary even if there were no ultimate trust in his favour.

Other points, which can only be briefly referred to here, require to be considered in drafting settlements of the nature dealt with above. Powers of revocation under which the settlor or his wife may benefit, or may cease to be liable for annual payments, will give him an "interest" unless they cannot be exercised for more than six years. Sums paid by the settlor which would otherwise have been deductible from his income for purposes of surtax are not allowable as deductions for that purpose to the extent to which income under the settlement is not distributed, and capital sums paid by the trustees to the settlor by way of loan or otherwise are in general treated as his income for purposes of income tax and surtax. It must be emphasised that the present article is intended to deal only with the ordinary form of voluntary settlement of investments or proceeds of sale of land; if this is departed from other pitfalls may be encountered which if not avoided will defeat the settlor's object.

There are a number of other points to be considered in drafting such settlements and advising as to their advantage or otherwise from a practical standpoint. Where income is accumulated during the minority of a child, he can on attaining twenty-one recover the income tax paid thereon. He will be entitled to the repayment for his own benefit even if he does not become absolutely entitled to the accumulations: *Dale* v. *Mitcalfe*, [1928] 1 K. B. 383; *Re Fulford*, [1930] 1 Ch. 71; Income Tax Act, 1918, s. 25. No right of repayment under section 25 will, however, arise if the income is deemed to be that of the settlor: Finance Act, 1936, s. 21 (6); Finance Act, 1938, s. 38 (6).

The settlor will not be able to claim relief in respect of children's allowance if the child is under the settlement entitled to more than £50 per annum in its own right. But the child would not be deemed to be so entitled unless (which is unusual) the terms of the settlement are such that he becomes entitled to the accumulations even if he dies under twenty-one: *Stanley* v. *Inland Revenue Commissioners*, [1944] K. B. 255. Similarly he will not, except in the like circumstances, be chargeable with surtax on the amount of accumulations paid to him on attaining his majority: *ibid.*

Income tax paid by the settlor on income deemed to be his must be repaid to him by the trustees of the settlement; but if he obtains a repayment in respect of any allowance or relief in excess of the amount to which he would apart from the Acts of 1936 and 1938 have been entitled, he must pay this to the trustees: Finance Act, 1936, s. 20 (2), (3); Finance Act, 1938, Third Schedule, Part I.

If an ultimate trust for the settlor in the event of the death of a child without issue is inserted, estate duty will be payable on the whole capital value of the funds if he does not survive the settlement by five years, the extended time specified in the Finance Act, 1946. If he does so survive, estate duty will still be payable on his contingent reversion, but payment may be deferred until the interest falls into possession. Duty will then be payable on the value of his interest as at that date; this will of course be nil if his reversion fails. But the value as at the

date of the settlor's death must nevertheless be taken for the purposes of aggregation with his other estate and of ascertaining the proper rate of duty thereon: *Re Eyre*, [1907] 1 K. B. 331; Finance Act, 1894, s. 7 (6).

NOTES ON THE PROPERTY ACTS OF 1925.

By W. J. L. AMBROSE, late Registrar at the Land Registry.

Having spent the best part of the last twenty-five years perusing abstracts of title, I am tempted to express a few reflections and wonder how far they accord with the conclusions of others.

The Property Acts of 1925 have done a lot to smooth the path of a purchaser of land in spite of the tear in the curtain (if it is a tear) caused by *Re Duce and Boots Cash Chemists (Southern), Limited's Contract*, [1937] 1 Ch. 642. It is surprising how often section 36 of the Administration of Estates Act, section 110 of the Settled Land Act, and various sections of the Law of Property Act supplied the answer to a requisition which, in the earlier years after 1925, one thought of making. And to one who was always weak on vulgar fractions the gradual disappearance of undivided shares is a blessing. No doubt they date from respectively early times, but they never had the mediæval glamour of copyholds nor the ingenuity which made uses such a handy tool.

A great deal more could no doubt be said on the credit side of these Acts, but it is a hall-mark of good conveyancing work that it provokes no discussion. In a sense it passes unnoticed. If my observations are mainly critical that is the explanation.

LAND CHARGES.

The Land Charges Act, 1925, has caused some trouble. Puisne mortgages remain on the register of land charges long after the mortgage has been paid off, and they appear on every later certificate of search, and the searcher has to inspect the application to register them in order to verify that they are the puisne mortgages of which he is aware. There should be some sanction which will persuade the mortgagee to cancel a puisne mortgage when it has done its work. No doubt the mortgagor would pay for this but it would be *pro bono publico*. If the puisne mortgagee has sold, the registration would no doubt have to remain to establish its priority, but such cases are a minority.

There are also a good many registrations of restrictive covenants and equitable easements which ought not to be registered. Out of an abundance of caution conscientious solicitors sometimes register restrictive covenants which can hardly be for the protection of any land of the covenantee and are really by way of indemnity against covenants in some earlier deed. And whatever an equitable easement may be, it cannot be a declaration that a grant of land includes no right to light and air or other easements over land retained by the

grantor. Yet such a declaration is sometimes registered as an equitable easement.

Possibly there should be some scrutiny by the Registrar of all applications to register a land charge, but this would involve more staff and would screen out only a small percentage.

The main trouble with land charges is the entries which "may or may not affect". A search against any of the large land developers usually discloses dozens of such. This is largely due to the vague description of the land against which a land charge may be registered. The application to register need only specify the county or riding and the parish, township, place or district, and even if a solicitor takes the trouble to describe the house by its street number, that number or the name of the street is often changed in the course of the next few years. As a matter of fact quite a lot of plans are used to show the land affected by the land charge. This is a great help, but the bulk of the land charges are registered against land in course of development, and when fields have been cut up into roads and house plots it is often difficult to say whether a particular house falls within the area shown on the land charge plan and it may require a surveyor's assistance to answer the question.

These difficulties were no doubt foreseen, but the only satisfactory solution would have been an elaborate index map, which would require to be kept up to date at a greatly increased cost. It is difficult to suggest a remedy, at all events in these days of scarcity, but such defects put unregistered titles at a considerable disadvantage compared with registered titles.

Some conveyancers also show a reluctance to ignore interests which are void against a purchaser because they were not duly registered as land charges, with the result that the purchaser accepts a conveyance subject to such an interest and sometimes gives his vendor a covenant for indemnity against it. This keeps the restrictive covenant, or whatever the interest is, on the title for many years after it might have been buried in oblivion. It may be that when the conveyance is being drafted there is still time to register a land charge and the draftsman has to provide for the possibility that it will be duly registered; but if the interest was created before the last vendor bought, no subsequent registration could affect the position.

Local Land Charges.

Local land charges are of immense importance to a purchaser. There are nowadays all manner of impositions by *vis major* on property which may seriously affect the use and value of land, and the old-fashioned nice conveyancing points pale into comparative insignificance. An official certificate of search at least says where one can find out about them, and it can hardly do more. It is then for the purchaser's unfortunate solicitor to ascertain their effect and advise his client accordingly. The root of this trouble is not really the Land Charges Act, 1925, but the many other acts and instruments which enable Tom, Dick and Harry to impose a burden on other people's land.

Co-owners.

Sections 34 and 36 of the Law of Property Act, 1925, which make land held by tenants in common and joint tenants subject to a trust for sale, were no doubt intended to relieve purchasers of the task of considering titles to proceeds of sale. But if a vendor is a sole survivor of two or more co-owners, a new trustee for sale must be appointed in order to make title under the trust for sale. This involves a certain amount of expense, and there is a tendency to make title otherwise, namely, by showing that the vendor is solely and beneficially interested within the meaning of the addition to section 36 made by the 1926 Act. This is all very well if the conveyance to the co-owners shows they are jointly and beneficially entitled; but so often that conveyance does not show anything of the kind, or even that the co-owners are not trustees for third parties, and the purchaser must then obtain other evidence on the point. This is rather rough on the purchaser as he does not get the simple title he might expect.

Things are still worse if the co-owners were tenants in common in equity, and the survivor has succeeded to his co-owner's share on the latter's death. Section 36 of the Law of Property Act, 1925, deals with legal estates "beneficially limited to or held in trust for any persons as joint tenants" and does not, either in its original form, or as amended in 1926, deal with tenancy in common except as a result of severance. To make title by showing that the surviving co-owner has acquired the dead one's share practically compels the purchaser to go into the title to each share in the proceeds of sale and into the due administration of the dead man's estate. Any stipulation in a contract that a purchaser should accept such title would be void under section 42 of the Law of Property Act, 1925. But in the interests of expedition and peace a vendor is not infrequently allowed to get away with it.

Receipts by Trustees for Sale.

The requirement that two individuals or a trust corporation shall receive capital moneys is no doubt a precaution against the fraud or folly of the trustee and has no other apparent purpose. It is therefore somewhat anomalous that if the law calls a man a trustee for sale of land he cannot give a receipt for capital money while any other fiduciary owner can. The others are generally one of the following :—

(a) Administrator. He is backed by his bond and this is a good reason for treating him differently.

(b) Bare trustees or nominees. These have been selected by someone who is *sui juris*, and if he has picked a wrong 'un he has only got himself to blame; but he may die and the trustee may die and then the succeeding beneficiaries are at the mercy of the trustee's personal representative, who may or may not be a rogue or fool. No doubt new trustees can be appointed, but if the personal representative is ready and willing to continue to act this would be somewhat of a reflection on him.

(c) Charity Trustees. These are usually numerous or the Official Trustee of Charity Lands is sole trustee. But if the estate is vested in a single individual trustee and he is authorised by the

terms of the trust to sell, he can sometimes give a good receipt as in *Re Booth & Southend-on-Sea Estates Company's Contract*, [1927] 1 Ch. 579. In that case the proceeds of sale were income for the purposes of the Charitable Trusts Acts and therefore were not capital for the purposes of the Settled Land Act, 1925. But the whole of a charity's endowment may well be income in this sense and so be exposed to the fraud or folly of the sole trustee.

(d) Executors. Under sections 36 and 39 of the Administration of Estates Act, 1925, a sole executor has for various purposes wide powers to sell and give a receipt. As a purchaser probably does not know and is not concerned to inquire whether he is selling for such purposes, this limitation on the executor's powers is no protection against fraud. The confidence reposed by the law in the single executor can be justified on the ground that the testator has selected the executor as someone to be trusted. But if a settlement is made *inter vivos*, the settlor has also selected the trustees, yet a sole trustee cannot receive capital on sale. And sometimes the executor is not the executor selected by the testator but is the executor of such executor or of some other executor in the chain of representation, yet his powers are the same.

The result is that a man might settle one estate on trust for sale by deed and another estate on trust for sale by will, and as a result of deaths and probates both estates might become vested in one and the same person. That person could not sell one estate because he is called a trustee, but he could sell the other because he is called an executor.

(e) Trustee Mortgagee. A sole surviving trustee can give a good receipt if he transfers the mortgage or sells under his power of sale. No doubt there are excellent reasons for this, but it is a yawning gap in the defences against fraud and folly. Yet mortgages of land are authorised trustee investments while land is not. If, however, the mortgage is foreclosed or the equity of redemption extinguished under the Limitation Act, 1939, the mortgagee becomes a trustee for sale and, as a sole trustee, loses his power to give a receipt for capital.

(f) Undisclosed Trusts. Section 74 of the Land Registration Act, 1925, boldly says " subject to the provisions of this Act as to settled land, neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express implied or constructive ". It would, however, have been too revolutionary then to give complete effect to such a doctrine; so the Act and Rules prescribe the entry of restrictions which bring registered land held on trust for sale substantially into line with unregistered land so held. But section 58 (3) of that Act and rule 213 of the Rules of 1925, which are intended to do this in the case of trusts for sale, curiously enough refer only to " joint proprietors " and " the survivor of joint proprietors ". The result is that if a sole trustee buys or otherwise acquires registered land, he is neither " joint proprietors " nor

"the survivor of joint proprietors" and no compulsory restriction is prescribed, and, unless he applies for the entry of such a restriction, he will be able to sell the land without anyone else's concurrence. It is true that section 95 of the Land Registration Act, 1925, says that "the statutory restrictions affecting the number of persons entitled to hold land on trust for sale and the number of trustees of a settlement apply to registered land", but the word "restriction" in this section suggests it is dealing with the maximum of four rather than the minimum of two.

A similar position would arise in the case of unregistered land if it were conveyed to a sole trustee without disclosing any trust. And if a trustee contemplated a future fraud if his betting account should go wrong, he would no doubt have the land conveyed to him as if he were beneficial owner.

The sum of these occasions when a single individual fiduciary vendor can sell and give a receipt must be pretty considerable; and if two individuals or a trust corporation are really necessary for the protection of beneficiaries something ought to be done to close these gaps. But does the experience of the last twenty years show that defalcations are more common in such cases? And were defalcations more common before 1926 when a sole trustee for sale could often sell? Unless the answers are undoubtedly yes, it is suggested that the two individuals or trust corporation should no longer be required. The present law does not cause much trouble or expense, but it shows some ridiculous anomalies which in the interests of logic and common sense should be reviewed. The argument from stocks and shares is stronger than ever. Investments in land involve trustees in all manner of tussles with rating, taxation, public health and other authorities, which busy trustees like to avoid, and there is probably now more trust money invested in stocks and shares than there ever was. Yet the law allows a sole individual trustee to realise such investments.

There are probably no statistics which show whether beneficiaries suffer more or less as a result of this liberty; but there is certainly no widespread opinion that stocks and shares are for these reasons more hazardous investments than land. Trusts for sale under sub-section (2) of section 2 of the Law of Property Act, 1925, are in a class by themselves. That is the sub-section which enables two individuals approved by the Court or a trust corporation to sell free from equitable interests or powers having priority to a trust for sale. If you create a power to sell land in which strangers are interested, there is every reason why the proceeds of sale should be specially safeguarded.

A similar reason justifies the existing provisions in the Settled Land Act, 1925, as to the receipt of capital money since the trustees of a later settlement may be the trustees of a compound settlement made up of the later settlement and earlier documents. Settled land, however, is hardly cognate. Everyone knows that the tenant for life is a limited owner, and if he is to sell there must be special precautions for the protection of the other interested parties. In this respect it

resembles land belonging to ecclesiastical and many other corporations. If the conditions under which they could all sell were harmonised and simplified it would be a blessing to lawyers, but that is another and much longer story.

DISPOSITIONS OF SETTLED LAND BY PERSONAL REPRESENTATIVES.

A learned contributor in the *Law Times* (vol. 201, p. 307) commented upon a suggestion of mine in an article ("Rents in the Settled Land Curtain", *ante*, vol. 10, p. 135) concerning the doubtful effect of a general grant where land does in fact remain settled land notwithstanding that there is no exception of settled land in the general grant. My view was that the settled land might not vest in the general personal representatives. He says that my suggestion disregards the Law of Property Act, s. 204; is contrary to the basis of the decision in *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, and also of *Hewson* v. *Shelley*, [1914] 2 Ch. 13. While I do not wish it to be thought to be more than a problem whose solution may not prove satisfactory to some conveyancers and, therefore, to be avoided by appropriate conveyancing machinery, I think the learned contributor has not fully appreciated the reasoning behind it.

Since the several cases affecting settled land grants: *In b. Taylor*, [1929] P. 260; *In b. Gibbings*, [1928] P. 28; *In b. James*, 162 L. T. J. 498; *In b. Clifton*, [1931] P. 222; *In b. Powell*, [1935] P. 115; it has been assumed on many hands that the effect of a grant of *probate* is to *vest* property in the executors named in the grant. I am not satisfied that this is correct: personal property vests in the appropriate executor immediately on death: *Woolley* v. *Clarke*, 5 B. & Ald. 744; and this would seem to apply to realty: A. E. A., s. 2 (1). It is true that the probate is conclusive evidence (of a sort) of the appointment of executors and that this is presumably the basis of *Re Bridgett and Hayes' Contract* (*supra*), and section 204, L. P. A., in its application to that case. But a general probate is only evidence of the appointment of general personal representatives which is not disputed. It is submitted that it is *not* evidence that there are no special personal representatives and no settled land.

It will be recalled that prior to 1926 copyhold legal estates did not vest in the general personal representative, but I never heard it suggested that it was necessary to exclude copyholds from the grant of probate. Likewise prior to 1897 no realty vested in the personal representatives, but realty was not (I think) expressly excluded from the grant. It is submitted that the true effect of A. E. A., s. 22 (1), is to create two separate sets of personal representatives at least where there is a will, and that A. E. A., s. 1 (1), which refers to the vesting of realty in the personal representative, only applies as to settled land (and see A. E. A., s. 3 (1)) in such circumstances by reference to the special executor created by section 22 of the Act. That is to say, settled land does not vest in any executor to whom probate is granted

but only "the personal representative" designated by the Act, namely, the special personal representative. My suggestion does not "disregard" section 204, but depends upon the interpretation to be put upon section 1 of the Administration of Estates Act.

Again, prior to 1926 it was held that notwithstanding the Land Transfer Act, 1897, the legal estate of an *intestate* vested in the heir-at-law: *Re Griggs*, [1914] 2 Ch. 547. As far as I know no similar suggestion has been made in connection with executors. The vital point is that letters of administration *constitute* title and operate to *vest* property in the administrator, but probate only confirms the already existing title and vesting in the executor: cf. *Graysbrook* v. *Fox*, 1 Plowd. 257; *Parton* v. *Basden*, 1 Mod. 215. Hence, if the realty is to vest in the personal representative as in the case of personalty it must vest in the person appointed for the purpose, and there is nothing in the general grant to suggest that any other order is being made.

I have been unable to find any case fairly in point in the old law concerning the effect of a grant where there were special executors appointed for limited property. These limited grants have existed from a remote time. The nearest authority is that of *Re Parker's Trusts*, [1894] 1 Ch. at p. 720. Here the general personal representatives exercised the statutory power to appoint new trustees in respect of an estate of which the testator had been trustee, and special executors appointed for the purposes of the trust estate were directed to convey the estate to the new trustees—but the point hardly seems to be discussed except to the extent of pointing out that the special executors automatically took the estate on death.

What should be noticed about this case is that the property was regarded as vested in the limited personal representatives and that a conveyance was deemed necessary to transfer it.

For these reasons the suggestion is not inconsistent with *Hewson* v. *Shelley* (*supra*). This case turned upon the appointment of an administrator. Such an order *does* operate to vest the property in the person nominated. Secondly, at that date it was not possible to get letters of administration without denying the existence of any will and the order so provided. The Administration of Estates Act, 1925, s. 27 (2), which replaces *Hewson* v. *Shelley* (*supra*), does not say anything contrary to this.

One *apparent* weakness in the foregoing argument should be mentioned, namely, the revocation of a probate where a later will is subsequently found. This does not, in my submission, affect the position. A purchaser at any rate is entitled to protection because the revoked probate was an order of the Court stating that it was a probate of the last will, and protection is afforded by section 204 of the Law of Property Act (replacing the Conveyancing Act, 1881). Whether such a probate mistakenly granted operates to divest the property from the true executors and vest it in the executors named in the probate, or whether it confers a power of disposition during the currency of the probate is a point on which I know of no authority. The vital issue here is that there is a grant affecting the property the subject-matter of the probate, whereas in my contention a general grant does not purport to deal with settled land and by statute has no authority to do so.

How far my contention is inconsistent with the basis of the judgment in *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, seems to me to be a moot point. Since the learned Judge held that the property had ceased to be settled land and that section 22 of the Administration of Estates Act did not apply, it seems difficult to say that the decision is directly in point. Furthermore, as the learned Judge held that there was no settled land, therefore, the order confirming the title of the personal representative could be relied upon since there was no question of there being a separate title. This, in fact, is precisely the point in *Hewson* v. *Shelley* (*supra*). It may, however, be argued that what the learned Judge was in fact meaning was that (apart from any exception of settled land) the property would be deemed to vest by virtue of a grant of probate in the general personal representative and so be deemed to be divested from the special personal representatives.

I have read the case many times, of course, and it does not appear to me that the learned Judge ever addressed his mind to the particular problem to which I have adverted, namely, exactly what a grant of probate covers as an order of the Court. What is more I do not think that it was necessary, in view of what he held concerning the particular facts, that he should address his mind to the problem. Consequently, in my view, conveyancers should not be asked to accept as a proposition of law a principle that is really an extension of an existing authority that in itself does not seem beyond question.

H. P.

The foregoing article has been kindly sent to the contributor to the *Law Times* above referred to who remains unconvinced of the soundness of the view expressed above and replies as follows :—

The writer of the above article contends that " a general grant does not *purport* to deal with settled land and by statute has no authority to do so ".

1. The form of a general grant is as follows :—

" Be it known that A B of —— died on the —— day of —— at —— And be it further known that at the date hereunder written the last will and testament with a codicil (a copy whereof is hereunto annexed) of the said deceased was proved and registered in [ ] *and that administration of all the estate which by law devolves to —— and vests in the personal representatives of the said deceased was granted by the aforesaid Court* to —— the executor named in the said will. And it is hereby certified that an affidavit ", etc.

It will be observed that the document is an order of Court and extends to all trust and mortgage estates, settled land is only one kind of trust estate. Freeholds before 1898 and copyholds before 1926, were not excluded from grants of probate because they did not then vest in the personal representatives as such—unless of course they were trust estates.

The grant includes all land vested in the deceased and in particular a grant is intended to apply to settled land, otherwise there would be no point in the exception " (save and except settled land, etc.) " being inserted in general grants.

2. The Administration of Estates Act, 1925, s. 22 (1), does not

require, it only authorises, the grant of probates " specially limited to the settled land ".

Obviously general grants must include settled land where the Settled Land Act trustees renounce or there is no such trustee.

3. It is submitted that it is reasonably clear that conveyancers must treat general grants as extending to and including settled land, except so far (if at all) as settled land is excluded from the grant, and that Law of Property Act, 1925, s. 204, *Hewson* v. *Shelley*, [1914] 2 Ch. 13, and *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, are rightly treated as fully justifying the course adopted by conveyancers in the matter.

4. Whether the cogent reasoning in the above article in support of the view that the legal estate in settled land will not vest by virtue of a grant in the deceased tenant for life's general personal representatives is right or not, it would seem to be of academic interest only as by virtue of section 8 of the Administration of Estates Act, 1925, the proving executors have all the powers conferred by law on the personal representatives and it follows that it is really immaterial whether they in fact get the legal estate by virtue of the grant or not, as they can dispose of it.

Editorial Note.—We must leave our readers to draw their own conclusions from this discussion, but we cannot forbear remarking that the Administration of Estates Act, s. 8, only seems to apply where one of several personal representatives has proved, which would presumably mean, according to the article, one of the special personal representatives. Consequently, it does not seem to carry the argument further.

THE NATIONALISATION OF COAL.

ITS HISTORY, PROGRESS AND REALISATION.

By Russell Gilbert, Barrister-at-Law.

The passing of the Coal Industry Nationalisation Act, 1946, marks the end of the controversy between those who hold the view that the coal with which nature has so richly endowed this country should not only be owned but should also be worked by the State and those who hold the contrary view and see no reason for departing from the present system under which it has been owned, whether by private persons or by large public or semi-public bodies (such as the Duchy of Lancaster and the Ecclesiastical Commissioners), or by commercial bodies, and under which it has been worked, in a few cases, by the owners either alone or in conjunction with other undertakings (such as steel, iron and shipbuilding) but, in the majority of cases, by lessees or licensees under leases or licences granted by such owners. With regard to the ownership it is sufficient for the purposes of this article to note that ever since the *Great Case of Mines* (R. *v.* The Earl of Northumberland, Plowd. 310) it has been the law of this country that *prima facie* the

owner of land is the owner of any coal which lies in or under it. In that case the Crown in or about the year 1568 established its right to the so-called " royal " mines, namely, gold and silver, and it was decided in effect that all baser minerals belonged to the subject in or under whose land they lay. Parliament has never intervened to alter this state of things until it did so by passing the Petroleum (Production) Act, 1934, by section 1 of which the property in petroleum existing in its natural condition in strata in Great Britain was made to vest in the Crown, petroleum being defined so as to include any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata but so as to expressly exclude coal and bituminous shales and other stratified deposits from which oil can be extracted by destructive distillation.

In the meantime the question of the nationalisation of coal had been considered on several occasions. In the year 1889 a Royal Commission was appointed to inquire into the economic operation of the royalty system upon the mining industry. In the year 1893 the Commissioners made their report in which they expressed the opinion that the system had not interfered with the general development of the mineral resources of the United Kingdom or with the export trade in coal with foreign countries, and that generally speaking it was not such as to require interference by legislation; but they recommended that some remedy should be provided for cases in which lessees were prevented from causes beyond their control from working the minerals which they had taken and also for cases of certain restrictions upon the assignment and surrender of leases, and that greater facilities should be given to tenants for life and to corporations and public bodies than they already had for dealing with mineral property and granting mineral leases. No legislation resulted from this. Shortly after the 1914—1918 war had ended, when a coal strike on a wide scale was threatened, and with a view to preventing such a calamity, an Act intituled the Coal Industry Commission Act, 1919, was passed, constituting a Commission to inquire into the position of and conditions prevailing in the coal industry, and in particular as to (amongst other matters) any scheme which might be submitted to the Commissioners for the future organisation of the coal industry, whether on the existing basis or on the basis of nationalisation or any other basis, and also as to the effect of the existing incidence of and practice in regard to the royalty system upon the industry and whether any change in that respect was desirable. The Commissioners were unable to agree upon a common report and four separate reports were made on June 20, 1919. These were unanimous in recommending the nationalisation of coal but disagreed with regard to the nationalisation of the industry itself. In view of the atmosphere in which this Commission was set up and the manner in which in some respects it performed its task, two of the Commissioners having seen fit to enter the witness chair and give evidence in support of their preconceived views in favour of nationalisation, it is perhaps not surprising that no immediate legislation resulted from its labours. In the course of its inquiry evidence had been submitted on behalf of the general body of royalty owners suggesting that (as had previously been suggested by the committee of reconstruction appointed after the war and presided over by Sir Leslie Scott, K.C., M.P. (now

Lord Justice Scott)) some tribunal should be set up for dealing with cases in which for various reasons colliery lessees were unduly prevented or hampered in the working or getting of coal. Subsequently, in the year 1923 the Mines (Working Facilities and Support) Act was passed. Stated shortly the effect of this Act was to enable such lessees to obtain from the Railway and Canal Commission compulsory orders conferring on them the powers denied to them in cases in which that tribunal considered that it was in the national interest that they should have such powers. On the whole this procedure has worked satisfactorily, and applications under the Act have been relatively few. In many cases where difficulties have arisen the mere existence of such powers has had the effect of causing the parties to arrive at terms for their solution without recourse to that tribunal. This Act was extended by sub-section (1) of section 13 of the Mining Industry Act, 1926, so as to enable persons (other than lessees) who are desirous of searching for or working coal, either by themselves or through lessees, to obtain such an order. Sub-section (2) of the same section also contained an important provision which empowered the Railway and Canal Commission, in cases in which the working of coal or the working of coal in the most efficient and economical manner was impeded by any restrictions, terms or conditions in a mining lease or otherwise binding on a person entitled to work coal, to grant a right to work such coal freed wholly or partially from such restrictions or conditions or to work the coal on other terms and conditions. The Commission thus acquired a power to alter the terms of existing leases, but it was held in the case of *Consett Iron Co.* v. *Clavering Trustees*, [1935] 2 K. B. 42, that the word "impeded" in the sub-section related exclusively to something which impeded or obstructed the actual working or carrying away of coal and that accordingly the Commission had no jurisdiction to relieve a lessee from financial obligations imposed by a lease.

The question of nationalisation was again considered by a Royal Commission (consisting of four members only) which was appointed on September 5, 1925, to inquire into and report upon the economic position of the coal industry and the conditions affecting it and to make any recommendations for the improvement thereof. These Commissioners made their report on March 6, 1926. After noting the fact that the members of the Statutory Commission of 1919, while in disagreement on most of the main issues before them, had been unanimous in favour of the State acquisition of coal, they, too, recommended that course notwithstanding that, in the course of their inquiry, they had become aware that some members of the 1919 Commission had since changed their views, partly on account of the enactment of the Mines (Working Facilities and Support) Act, 1923. This report was followed by the enactment of the Coal Mines Act, 1930, which, however, left the position untouched as regards the ownership of the coal in this country. Thus what had been the undisputed law of the land ever since the *Great Case of Mines* more than three and a half centuries before, remained unchanged until the year 1938 when a stride forward on the road to nationalisation was effected by the enactment of the Coal Act, 1938. That Act created a body styled the Coal Commission, charged with the duty of exercising the functions of owners of the fee simple of coal

and mines of coal in such manner as they might think best for promoting the interests, efficiency and better organisation of the coal mining industry, but it was forbidden itself to carry on any coal mining operations other than searching and boring for coal, except so far as was requisite for preserving in good order premises not for the time being subject to a mining lease. "Coal" was defined so as to mean bituminous coal, cannel coal and anthracite, and in certain cases other minerals associated therewith, and a "mine of coal" was defined so as to mean a space which is occupied by coal or which has been excavated underground for the purposes of searching and boring for, winning, working, getting, carrying away, making merchantable or disposing of coal, and so as to include a shaft and an adit made for any of those purposes. Stated shortly, the general effect of the Act was to create on January 1, 1939, a statutory contract between the owners of such coal and associated minerals and the Coal Commission for the sale thereof to the Coal Commission at a price to be fixed by valuation, together with all easements and rights appurtenant thereto other than rights to withdraw support and rights created by orders made by the Railway and Canal Commission under the Mines (Working Facilities and Support) Act, 1923, and with the benefit of all restrictive covenants annexed thereto but subject to all easements, rights, restrictive covenants and other matters adversely affecting them, and, in cases in which they were subject to leases or tenancies, subject to and with the benefit thereof; such contract to be completed on July 1, 1942, by a statutory conveyance which the Act also effected. In addition to the rights passing by such conveyance the Act directly conferred on the Coal Commission certain rights to withdraw support from the surface. In cases in which the coal was severed in ownership from the surface otherwise than by a lease, the Coal Commission acquired similar rights to withdraw support from the surface to those possessed by the expropriated owners; in cases of severance by a mining lease, the right which vested in the Coal Commission was extended to the whole of the period during which the coal to which the right to withdraw support was annexed remained ungotten; in cases of non-severance the Coal Commission acquired a right to withdraw support subject to an obligation to make good or pay compensation for damage caused thereby. The Act also (by section 15) conferred on the Coal Commission a right (subject to certain restrictions) to occupy and use in the course of coal-mining operations any underground land which did not pass to it under the statutory conveyance. It, however, acquired no rights over surface land which did not so pass to it, but it was left to make application for such rights, when required, to the Railway and Canal Commission under the Mines (Working Facilities and Support) Act, 1923. Section 41 of the Act provided that it should have effect in relation to premises that were registered land within the meaning of the Land Registration Act, 1925, as if they had not been registered land and that all rights and title conferred on the Coal Commission by the Act should be "overriding interests" within the meaning of that Act. As, however, there is little or no land in coal mining districts the title to which is registered this provision is of little importance or interest to conveyancers.

With regard to the compensation to be paid to the expropriated

owners the Act provided that this should be ascertained separately in respect of what were termed " principal coal hereditaments " and what were termed " subsidiary coal hereditaments ". The former consisted of everything which passed to the Coal Commission under the statutory conveyance except (i) minerals or substances other than bituminous coal, cannel coal and anthracite and property and rights annexed thereto and not to any such coal or anthracite or to a mine thereof, and (ii) easements and rights appurtenant to coal or a mine and adversely affecting the surface. The latter consisted of the excepted matters. The Act provided a sum of £6,450,000 as the total compensation payable in respect of all " principal coal hereditaments ", and it established machinery for ascertaining how this sum was to be shared by the expropriated owners. For this purpose Great Britain was divided into certain regions, to each of which there was allocated by a Central Valuation Board a part of this sum bearing the same proportion to the whole of it as the value of all the " principal coal hereditaments " in the region bore to the value of all " principal coal hereditaments " in Great Britain; and each owner in the region became entitled to a part of the regional allocation bearing the same proportion to the whole of it as the valuation by a Regional Valuation Board of his property bore to the aggregate values of his property and the property of other owners in the same region. The value of the " subsidiary coal hereditaments " was also ascertained by the Regional Valuation Boards. The Act provided that the compensation should carry interest from July 1, 1942, to actual payment at the rate per cent. equivalent to the average yield (as ascertained by the Treasury) as on July 1, 1942, of the Government securities prescribed by the Treasury in accordance with the provisions of Part II of the Land Settlement (Facilities) Act, 1919, which, in the result, worked out at £3 0s. 11d.

Thus, the result of the Act was to make the Coal Commission the owner of all unworked coal in Great Britain and to transfer to it the reversion to all coal comprised in leases, but, as has been previously noticed, it acquired no power to itself work the coal acquired by it. In other words the leasehold system continued to subsist but with one lessor only.

One of the root principles of English land law is that expressed in the maxim " Cujus est solum ejus est ad cœlum et usque ad inferos ". Theoretically, therefore, all conveyances of land after the Petroleum (Production) Act, 1934, ought to have contained an exception of any petroleum as defined in that Act within or under the land conveyed; and after July 1, 1942, all conveyances of land ought to have contained an exception of all coal or other minerals and mines vested in the Coal Commission and to have been expressed to be made subject, so far as the land conveyed was or might be affected thereby, to the rights of the Coal Commission. In practice, however, this has not generally been done except in the case of conveyances of land in mining districts and in cases in which railway companies, in purchasing land near their railways, have aquired the minerals under such land and have had such minerals expressly conveyed to them so as to exclude the operation of section 77 of the Railways Clauses Consolidation Act, 1845, by

virtue of which such minerals would otherwise have been excluded from such conveyance.

The raw material of the industry having thus become nationalised, the process of nationalisation was completed by the passing of the Coal Industry Nationalisation Act, 1946. That Act creates a corporation under the name of "The National Coal Board" (with power to hold land without licence in mortmain) charged with the duties of working and getting the coal in Great Britain to the exclusion (with certain minor exceptions) of any other person, securing the efficient development of the coal-mining industry and making supplies of coal available; and it confers on them power to carry on all such activities as appear to them to be requisite, advantageous or convenient for them to carry on for or in connection with the discharge of such duties and to do anything and to enter into any transaction which in their opinion is calculated to facilitate the proper discharge of their duties or the carrying on by them of any of such activities as is incidental or conducive thereto. "Coal" is defined by section 63 of the Act as bituminous coal, cannel coal and anthracite.

If the coal of Great Britain had in practice been worked, gotten, made saleable and dealt in by companies, firms or individuals whose activities were confined to such operations, the transfer to the State of their property and rights, duties and liabilities would have been a comparatively simple matter. This, however, is not the case, but in many cases such concerns have other activities, and the matter is further complicated by the fact that the property owned or used by them is often used partly for coal production and partly for the purposes of their other activities. Consequently the general scheme of the Act is to divide the assets of all colliery concerns and, in the case of companies, their subsidiaries into three classes. The first of these classes consists of assets which are described in Part I of the First Schedule to the Act, which are to become vested in the Board without any further assurance on such date as the Minister of Fuel and Power may by order appoint (in the Act referred to as "the primary vesting date"); but the Minister may by order exclude any asset of this class from vesting if an application is made to him by the Board not later than the expiration of one year from the primary vesting date and the owner of the asset consents. The second class of assets consists of those described in Part II of that Schedule, as to which the Board and the owners are respectively given options exercisable by notice in writing to have them transferred to the Board and which, if the option is exercised, are to vest in the Board on the first day of the month next after that in which the notice exercising it is given, or if it is given before the primary vesting date on that date. The third class consists of those described in Parts III and IV of that Schedule, as to which the Board and the owners are respectively given the like options, subject to a provision that the party who receives a notice exercising the option may give a counter-notice to the other party objecting to the vesting in the Board of all or any of the assets to which the notice exercising the option relates, in which case the question whether the assets as to which objection is so made or any of them are to so vest is to be determined by the arbitration of a member of a panel of arbitrators to be appointed by the Lord Chancellor for that purpose;

and the date of the vesting of such of them as under the award of such arbitrator are to so vest, is to be as it would have been if the notice exercising the option had been given on the date of the award. Where an asset vests in the Board by virtue of the exercise of an option, the owner of the asset is to be deemed, as respects the period of his ownership thereof between the primary vesting date and the date of the vesting thereof, to have held it as an agent of the Board and accordingly is to be liable to account to the Board for all rents, profits and other income for that period arising therefrom or from the use thereof and to be entitled to be indemnified against all expenses, liabilities and other outgoings for that period incident thereto or to the use thereof.

Two important provisions of section 5 of the Act under which the vesting of assets mentioned above will be effected are that such vesting will take effect free from any charge or lien for securing money or money's worth to which the assets are subject, and that the Minister is thereby empowered by regulations to make such provision supplementary to or consequential on the provisions of that section and of the First Schedule to the Act as appears to him to be necessary or expedient, and in particular these may provide (amongst other things) for designating (with effect where so prescribed from the date on which the assets in question vest in the Board) easements and other property and rights that are to vest in the Board with any of the assets vesting in them; for designating with effect as from the same date easements and other restrictions, rights and liabilities subject to which or free from which any of the assets are to vest in the Board; for apportionments consequent on the vesting of interests in respect of which periodical payments are accruing at the date of their vesting; for apportionments and indemnities consequent on the severance of leasehold interests and of interests held subject to leases by reason of the vesting; for the registration of the title of the Board to assets vesting in them of a kind subject to provision for the registration of title thereto; for vesting in the Board the property in and the right to possession of documents relating to the title or to the management of things interests in which vest in the Board, and for conferring on the Board the right to production of documents and to delivery of copies thereof.

A full appreciation of the effect of the Act depends largely on an understanding of the numerous definitions which it contains, some of which are to be found in section 63 of the Act and others in paragraph 25 of Part V of the First Schedule to it. The following are some of the most important for a proper understanding of the various kinds of assets comprised in the First Schedule to the Act:—

"Mine of coal" means a space occupied by unworked coal or excavated underground for the purposes of colliery activities and includes a shaft or adit made for those purposes, a coal quarry and opencast workings of coal.

"Colliery concern" means a company whose business includes or at any time on or after January 1, 1946, included the working of coal (excluding working undertaken for the purpose of digging or carrying away coal in the course of activities other than colliery activities and working undertaken only as ancillary to the working of minerals other than coal) and any other person whose business includes or at any such time included such working of coal as aforesaid.

"Subsidiary" means in relation to a colliery or other concern a company not less than 90 per cent. of the issued share capital of which is in the beneficial ownership of that concern, and for the purpose of the foregoing definition shares of a company shall be treated as if they had been in the beneficial ownership of a colliery or other concern if they are in the beneficial ownership of—

(a) a company that is a subsidiary of that concern within the foregoing definition, or

(b) a company which owns not less than 90 per cent. of the issued share capital of that concern (in a case in which it is a company).

"Class A subsidiary" means in relation to a colliery concern a subsidiary thereof whose business includes coal carbonisation and coal products distillation activities allied with colliery activities or includes manufactured fuel activities, and "Class B subsidiary" means in relation to a colliery concern a subsidiary thereof not being a Class A subsidiary.

"Colliery activities" means searching or boring for, winning, working or getting coal, bringing it to the surface, treating it and rendering it saleable, and includes depositing spoil arising from working coal or from any other of the activities mentioned in this definition.

"Coal carbonisation and coal products distillation activities allied with colliery activities" means distilling coal and treating and rendering saleable products (including coke) of the distillation of coal.

"Manufactured fuel activities" means manufacturing and rendering saleable any manufactured fuel (including carbonised briquettes and ovoids) of which coal or coke is the principal constituent.

"Fixed property" means all buildings, works, fixtures, and fixed machinery and plant, and the sites thereof.

"Movable property" means all movable machinery and plant, wagons and other vehicles, engines, tractors, vessels (other than seagoing vessels), animals and other movable equipment of any kind.

In the following paragraphs an attempt has been made to summarise the contents of the four Parts of the First Schedule.

Part I

(1) Interests (defined so as not to include a mortgage, estate or other interest held by way of security) in unworked coal and in mines of coal of colliery concerns and of the Coal Commission and any other interest being a "retained interest" within the meaning of the Coal Act, 1938, by virtue of sub-sections (1) to (5) of section 5 of that Act, except interests of persons other than the Coal Commission in any coal that is necessary to be dug or carried away in the course of activities other than colliery activities or in a mine of coal used immediately before the primary vesting date exclusively or mainly in the course of such other activities. The "retained interests" within the meaning of the Coal Act, 1938, are, speaking generally, the leasehold interests which did not pass to the Coal Commission under the statutory conveyance effected by that Act.

Interests of the Coal Commission in minerals other than coal and interests of colliery concerns and their subsidiaries in unworked

minerals other than coal, being minerals which can only be economically worked in association with the working of coal or economically brought to the surface by the use of a mine or coal an interest in which vests in the Board. Under this head unworked " coal " and " mines of coal " will pass.

(2) Interests of colliery concerns and Class A subsidiaries in fixed and movable property used for " colliery activities ", " coal carbonisation and coal products distillation activities allied with colliery activities " or " manufactured fuel activities " all of which are comprehensively referred to as " colliery production activities "; but in cases where they operate iron and steel works their interests in fixed and movable property used for coal carbonisation and coal products distillation activities allied with colliery activities are excepted from Part I and are made to fall within Part IV of the Schedule, but only if they are not exclusively or mainly used to supply coke to iron and steel works. The property included under this head will, generally speaking, embrace collieries, colliery coke-ovens and manufactured fuel plants.

(3) Interests of colliery concerns and of Class A subsidiaries in fixed and movable property used for or in connection with certain activities referred to as " colliery electricity activities ". These will in general comprise colliery electricity plants.

(4) Interests of colliery concerns and Class A subsidiaries (other than those operating iron and steel works) in fixed and movable property used exclusively or mainly for any of certain activities referred to as " colliery transport activities ". These will in general comprise all colliery transport, loading and storage works such as railways, tramways, aerial ropeways and canal wharves.

(5) Interests of colliery concerns and Class A subsidiaries in fixed and movable property used exclusively or mainly for the purposes of the sale or supply by them of products of colliery production activities (referred to as " colliery sales activities ") or for the purposes of the sale or supply of such products by bodies administering schemes under Part I of the Coal Mines Act, 1930.

(6) Interests of colliery concerns and Class A subsidiaries in fixed and movable property used in connection with certain activities referred to as " colliery welfare activities ". These will in general comprise colliery institutes, hospitals, baths and canteens.

Interests of colliery concerns and Class A subsidiaries in fixed and movable property used at a coal mine within the meaning of the Coal Mines Act, 1911, in rescue work.

(7) Interests of colliery concerns and Class A subsidiaries in fixed and movable property used exclusively or mainly for certain incidental activities which will include such things as colliery offices and workshops.

(8) Interests of colliery concerns and Class A subsidiaries in stocks of products of colliery production activities.

(9) Interests in land forming the curtilage of fixed property which vests in the Board (whether without option or by virtue of the exercise of an option) and in land reserved for development or extension in cases in which such land is used or reserved for use exclusively or mainly for the purpose of activities of a kind which render the interest in such fixed property subject to vesting in the Board.

PART II

(1) Interests of colliery concerns and Class A subsidiaries in consumable or spare stores (defined by paragraph 25 of Part V of the Schedule so as to mean consumable stores including supplies of timber or materials of any kind and movable property which is surplus to ordinary requirements and which has not at any time been issued for use or as a standby) available for use for colliery production, electricity, transport, sales or welfare activities.

(2) Interests of companies or other persons whose business consists exclusively or mainly of activities for the purposes of the purchase for colliery concerns or Class A subsidiaries thereof or both of things required for colliery production activities in such things and in fixed or movable property used exclusively or mainly for activities for those purposes.

(3) Interests of colliery concerns and Class A subsidiaries in fixed and movable property used for supplying water from a mine of coal and their interests in consumable or spare stores available for use for that purpose.

(4) Interests of colliery concerns and Class A subsidiaries in wharves (not being canal wharves), private harbours, staithes and fixed and movable property appurtenant thereto, used for colliery transport activities.

(5) Interests of colliery concerns and Class A or Class B subsidiaries in dwelling-houses or in other land owned by them for the purpose of providing housing accommodation for staff employed in colliery production, electricity, transport, sales or welfare activities.

(6) Interests of colliery concerns in farms (defined by reference to the Rating and Valuation (Apportionment) Act, 1928) and farming stock and other agricultural assets (defined by reference to the Agricultural Credits Act, 1928).

PART III

(1) Interests of persons by whom manufactured fuel activities are carried on, other than colliery concerns or Class A subsidiaries in fixed and movable property used exclusively or mainly for the purposes of manufactured fuel activities.

(2) Interests of persons (other than colliery concerns or Class A subsidiaries thereof) whose business includes the operation of railways, aerial ropeways, wharves, harbours or staithes in fixed and movable property used exclusively or mainly for colliery transport activities for the purposes of a particular colliery concern or a Class A subsidiary thereof or both.

(3) Interests of companies being companies in whose respective businesses two or more colliery concerns have interests in fixed and movable property used exclusively or mainly for the purposes of the sale or supply by such a company of the products of colliery activities of the interested concerns or any of them.

(4) Interests of any persons owned by them for the purposes of a central rescue station equipped for rescue work and for the training of rescue workers which is provided and maintained in pursuance of

regulations made under the Coal Mines Act, 1911, in fixed and movable property used for those purposes.

(5) Interests of colliery concerns and of Class A subsidiaries in fixed and movable property used for the purposes of the making of bricks, tiles, earthenware pipes or other products manufactured from colliery debris or brick clay or earth or in connection with those purposes and their interests in consumable or spare stores available for use for such activities.

(6) Interests in land forming the curtilage of fixed property which vests in the Board (whether without option or by virtue of the exercise of an option) and in land reserved for development or extension in cases in which such land is used or reserved for use partly, but not exclusively, for the purpose of activities of a kind which renders the interest in such fixed property subject to vesting in the Board.

Sub-section (2) of section 8 of the Act confers on the Board a right to use land falling within this category while they are considering to what extent they will require to exercise their option to acquire it, subject to an obligation to pay compensation for or make good any damage sustained in consequence of such use by the owner of any interest in the land used if they do not subsequently exercise their option to acquire it.

Part IV

Interests of colliery concerns and Class A and Class B subsidiaries in any things (other than investments, interests in other concerns owned otherwise than as investments, cash or other liquid assets, patents or copyrights in registered designs (which are dealt with by section 6 of the Act) or the benefit of contracts (which are dealt with by section 7)) not rendered subject to vesting in the Board by Parts I, II and III of the Schedule, except their interests in iron and steel works and their interests in fixed and movable property used for coal carbonisation and coal production distillation activities allied with colliery activities, where the exclusive or main purpose of the activities for which the property is so used is to supply coke to an iron and steel works operated by the colliery concern or subsidiary or by a concern of which the colliery concern is a subsidiary.

In addition to the assets which under section 5 the Board and the owners respectively have an option to have transferred to the Board subject to arbitration in the case of objection, section 6 confers a similar option as regards " proprietary interests " (as defined by that section) of colliery concerns and of Class A and Class B subsidiaries thereof in patents for inventions intended for use or capable of being used for or in connection with " colliery production activities " (as defined in Part I of the First Schedule to the Act) and in copyrights in registered designs intended for application or capable of being applied to articles adapted for use for or in connection with such activities, and in the case of a reference to arbitration the arbitrator is empowered, if he is of opinion that such a proprietary interest ought not to vest in the Board, by his award to grant to the Board a non-exclusive licence under the patent or copyright to make, use, exercise or vend the invention or to apply the design on such terms as may be settled by him and specified in the award, being

terms appearing to him to be such as would be agreed upon between a willing grantor and a willing grantee. "Proprietary interest" is defined for the purposes of the section to mean in relation to a patent the interest of a person whose name is for the time being entered or required to be entered in the register of patents as the grantee or proprietor of the patent or as one of two or more grantees or proprietors thereof; and in relation to a registered design to mean the interest of a person whose name is for the time being entered or required to be entered in the register of designs as the proprietor of the design or as one of two or more proprietors thereof; and a similar option is given with respect to interests subsisting by virtue of licences under patents and copyrights. Sub-section (3) of section 8 of the Act confers on the Board a right to make, use and exercise such inventions and to apply such registered designs while they are considering whether they will exercise their option to acquire them (or a licence in respect of them) subject to an obligation to pay compensation to the person entitled to authorise them to do so.

Section 7 of the Act prescribes the extent to which contracts, such as are mentioned in the Second Schedule to the Act, are to have effect in favour of and against the Board, but a consideration of these will be of no interest to the conveyancer or property lawyer and they are therefore not dealt with in this article.

Paragraph 23 of Part V of the First Schedule to the Act provides that for the purposes of the Act all dealings with interests in things owned (including changes in the purposes for or in connection with which they were used or available for use) between January 1, 1946, and the primary vesting date or the relevant date on which a notice exercising an option under sub-section (2) or (3) of section 5 is given shall be disregarded unless, on a question being raised as to the vesting in the Board of such interests, it is proved by the person contesting such vesting that the dealing in question was due to something done or occurring in the ordinary course of business and in no way connected with any provision made by the Act or with any anticipation of the making of any such provision; and the Act contains similar provisions in cases in which a thing has ceased during that period to be used for or in connection with or to be available for a purpose and also in cases in which there has been a change during that period in the relations between a company and its subsidiary.

Section 8 of the Act has the effect of transferring to the Board on the principal vesting date the rights and powers in relation to the use of underground land which, as noticed above, were vested in the Coal Commission by section 15 of the Coal Act of 1938.

Under sub-section (3) of section 9 of the Act the following questions are to be determined by arbitration under the Act:—

(1) Questions as to what is or is not included in the assets described in the First Schedule to the Act or any part of it or in section 6 or otherwise as to the construction or effect (so far as regards the vesting of assets, property or rights in the Board) of sections 5 or 6 or of regulations made thereunder or of that Schedule;

(2) questions as to the existence or extent of any liability to account or right to be indemnified as is mentioned in sub-section (5)

of section 5 or otherwise as to the construction or effect of that sub-section;

(3) questions as to whether a contract is such a contract as is mentioned in the Second Schedule to the Act or otherwise as to the construction or effect, so far as regards the transfer to the Board of rights and liabilities under contracts, of that Schedule;

and sub-section (4) of the same section authorises the making of regulations for the purpose of estopping persons from questioning or reopening matters relating to the vesting in or transfer to the Board of assets, property, rights and liabilities after such matters have been dealt with in accordance with the Act.

In view of the provisions of the Act relating to the transfer of property to the Board which have been summarised above, it seems incumbent on the legal advisers of those who have contracted or are about to contract to purchase property of an industrial character to consider, inquire into and ascertain the following matters, *viz.* :—

(1) Whether the property contracted to be purchased or any part of it has become vested or (if the principal vesting date has not yet arrived) will on that date vest in the Board; and if not,

(2) whether the property or any part of it is subject to any option exercisable by the Board or by the vendor to require it to be so vested; and if so,

(3) whether a notice exercising such option has been received or given by the vendor; and (whether or not such a notice has been received)

(4) whether there is any right to have the question whether the property affected by such option ought to be vested in the Board determined by arbitration; and, if a notice exercising the option has been received by the vendor,

(5) whether any counter-notice objecting to the vesting has been given by the vendor; and if so,

(6) whether the arbitration proceedings have commenced, and if so what stage they have reached.

With regard to the compensation to be paid to the expropriated owners, the Act follows the same principles as were adopted in the Coal Act of 1938. It provides for the assessment separately of what are respectively termed the "coal industry value" and the "value for subsidiary purposes" of the interests to be transferred to the Board. It provides a global sum for the former to be fixed, in accordance with an agreement made before the passing of the Act between the Minister of Fuel and Power and the Mining Association of Great Britain, by a special tribunal which has since assessed it at the sum of £164,660,000. It provides for the apportionment by a Central Valuation Board of this sum to a number of valuation districts to be prescribed by the Minister and for the constitution by him of compensation units (which are to be valued by District Valuation Boards) so as to include in some such unit every transferred interest and for the allocation of each unit to one or other of these districts. The normal unit (subject to variation in special cases) is to be a unit consisting of all the transferred interests of a single colliery concern or other owner which are interests in property situated permanently in or ordinarily operated from a

single district and which are not subject to different incidents. The amount of the compensation to be made in respect of each unit is to be the aggregate of (1) an amount bearing the same proportion to its "coal industry value" as the amount apportioned to the district bears to the aggregate of the "coal industry values" of all compensation units allocated to the district, and (2) its "value for subsidiary purposes". The Act also provides (by section 17) for the payment of compensation in respect of the increase of the overhead expenses of the expropriated owners consequent upon the severance of their assets, and also (by section 18) for refunds to be made to them in respect of capital outlay since August 1, 1945.

The compensation will, in general, be satisfied by government stock of such an amount as in the opinion of the Treasury is of a value equal on the date of issue to the amount to be satisfied, having due regard to the market values of other government securities existing at such date. This stock, in the case of transferred interests which are not subject to any lien or charge from which they are freed by section 5 of the Act, will be receivable by the expropriated owner, but in other cases the recipients are to be designated by regulations framed so as to safeguard the rights of persons entitled to beneficial interests; and the Act authorises the making by regulations of provisions for the payment of the compensation into Court or to trustees to be appointed by the Minister; but it enables the compensation to be paid direct to a company in cases in which the transferred interest is affected by debentures containing only a floating charge. Payments will be made in money in respect of the interim income payable under sub-section (2) of section 19 of the Act for the period between the principal vesting date and the date on which the compensation is fully satisfied. Except in the case of companies and their subsidiaries such payments will be of an amount equal to interest for that period on the compensation at a rate or rates to be prescribed by the Treasury; but in the excepted cases the payment in respect of each of the two years beginning with the principal vesting date and the anniversary thereof is to be based on the amount of their profits and gains attributable to the activities for which the transferred assets were used or owned, computed on income tax principles (subject to such adaptations as may be prescribed by regulations), for their last complete accounting period before July 1, 1946, or the average of the amount of such profits and gains so attributable for its two complete accounting periods last before July 1, 1944, and 1945 respectively; but if such amount of profits and gains is less than an amount equal to fourpence per ton on their output of coal disposable commercially for that period, their profits and gains will be reckoned as if they had been of that amount.

Restrictions are (by section 23 of the Act) imposed on the disposal of the stock to be issued in satisfaction of the compensation payable under the Act. Such stock cannot be sold or disposed of except in the following cases, *viz.*:—

(1) Such stock can be transferred to debenture holders of companies in satisfaction of their rights as such or to members of companies in satisfaction of their rights to a return of capital or to participation in surplus assets (this presumably includes

a return of capital both in a winding-up and on a reduction of capital).

(2) In the case of companies in liquidation such stock can be disposed of by way of sale or in any other manner for any purpose other than satisfying the rights of its debenture holders or members.

(3) In the case of companies not in liquidation so much of the stock (a) as it is requisite to sell for the purpose of satisfying the rights of or obligations of the company to persons other than its debenture holders or members, and (b) as is shown to the satisfaction of the Treasury to be requisite for the purpose of raising an amount of liquid capital which in the opinion of the company is needed for its business or that of a subsidiary, or in order to facilitate a development or extension of its business or that of its subsidiary and which otherwise the company would be enabled to raise, can be sold;

but when the stock has been so disposed of it becomes free from the restrictions. Powers are given to the Treasury to make provision by regulations—

(1) for the issue of stock which on the issue thereof will be subject to restrictions under the section, in form inalienable but exchangeable, for a like amount of government stock transferable in the ordinary manner, at a date to be fixed by it as being the date when the purposes of the section have been substantially satisfied;

(2) for the issue, direct to debenture holders or members of companies in satisfaction of their rights, of stock to be issued in or towards compensation or stock to be issued in exchange;

(3) for rendering it obligatory on such debenture holders or members to accept stock issued, in or towards satisfaction of compensation or stock issued in exchange, in satisfaction of the rights which they would otherwise have had to payments in cash.

Section 24 makes provision for the establishment of a tribunal for the purpose of affording protection to expropriated owners whose interests transferred to the Board form a substantial part of their resources and against whom steps, attributable to the passing of the Act or to matters arising in consequence thereof, have been taken for the enforcement of a liability to make a payment or for the enforcement of a security upon their property. Such tribunal is empowered to direct that an applicant for such protection is entitled to it, and whilst such a direction is in force none of the rights or remedies for the exercise of which leave is required under section 1 of the Courts (Emergency Powers) Act, 1943, are to be exercised against the applicant or his property (whether or not that Act remains in force for the time being) except with the leave of the appropriate Court within the meaning of that Act.

It may be of interest to those having investments in colliery concerns to note that section 25 of the Act provides for the making of regulations designed for the adjustment of the rights of different classes of debenture holders and shareholders with respect to the compensation, and these are to have due regard to what their relative expectations of

income yield from their debentures or shares would have been if the Act had not been passed and to the respective priorities of their holdings. Company lawyers will note that these regulations are to provide for bringing schemes of arrangement between different classes of debenture holders and shareholders with respect to the compensation within the framework of section 153 of the Companies Act, 1929. Such schemes will be effective if they are assented to within a period and by majorities to be prescribed by the regulations and if they are either not objected to by any member of the class concerned or, if so objected to, are approved by a special tribunal to be established for this purpose.

Section 43 of the Act amends the Mines (Working Facilities and Support) Act, 1923, so as to bring it into line with the new regime and enables the Board to make application to the Railway and Canal Commission for rights required by it.

Section 48 of the Act contains provisions of importance to landowers in mining districts and to railway companies whose railways run through such districts. It will have effect in cases in which a colliery concern either has no right in working its coal to withdraw support from the overlying surface of the landowner or else has such a right exercisable only upon the terms of paying compensation or making good damage done or occasioned by its workings, and has worked in such a way as to withdraw support from the surface and caused it to subside, with the result that such surface or buildings on it have been damaged. In such cases the effect of the section appears to be as follows: where the cause of action has accrued or the damage has occurred on or after the principal vesting date the liability of the colliery concern to pay damages or compensation is transferred to the Board. In other cases the section imposes on the Board an obligation to indemnify colliery concerns against expense reasonably incurred by them in disposing of claims in respect of such liabilities on or after the primary vesting date.

The provisions substituted by Part II of the Mines (Working Facilities and Support) Act, 1923, for sections 78 to 85 of the Railways Clauses Consolidation Act, 1845, imposed on royalty owners and colliery concerns respectively a liability in certain circumstances to contribute towards the expenses incurred by railway companies in making good damage caused by the working of coal under or within a prescribed distance of their railways. In cases where the execution by the railway company of works for making good such damage has been begun on or after the principal vesting date, this liability is also transferred to the Board.

Section 49 of the Act contains provisions of importance to landowners in mining districts who may suffer damage at the hands of the Board or its representatives. The Public Authorities Protection Act, 1893 and Limitation Act, 1939, confer on public authorities certain immunities and privileges with regard to actions or proceedings brought against them. These Acts prohibit the bringing of any action or proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of

action accrued or where the act, neglect or default is a continuing one from the time when the act, neglect or default ceased; and they impose on anyone who is unsuccessful in any such action or proceeding a liability to pay the defendant's costs as between solicitor and client and not merely as between party and party. Sub-section (1) of section 49 provides that these Acts are not to apply to any action, prosecution or proceeding against the Board for or in respect of any act, neglect or default done or committed by a servant or agent of the Board in his capacity as a servant or agent of theirs. Whilst thus extending what would or might otherwise have been the rights of persons injured by acts done or neglected to be done by the Board or by its officers, servants or agents in the course of their duties, the section curtails their rights in another respect. Under section 2 of the Limitation Act, 1939, rights of action in respect of contracts and torts generally become barred at the end of six years from the date when the cause of action accrued. This period is by sub-section (2) of section 49 shortened to three years in the case of such actions as are mentioned in sub-section (1) thereof. Landowners, therefore, whose lands or buildings have suffered damage resulting from subsidence caused by the wrongful working by the Board of the coal which supported it will now only have three instead of six years within which to commence actions to obtain redress. In this connection it is important to note that the cause of action accrues not when the working takes place but when the damage is done. The tort involved in such working is not the working of the coal in such a way as to cause subsidence but is the damaging of the landowner's property. The mere removal of the coal which supports the land overlying it is not in itself a tort. It is open to any owner of coal to deal with it in any manner he thinks fit, provided that he does not infringe the legal maxim, " Sic utere tuo ut non alienum lædas ". He may, if he desires, remove the whole of the coal or other substrata belonging to him and provide artificial support for the overlying land and, if he does so and the support provided is adequate for the purpose, he commits no tort (see *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, and *West Leigh Colliery Co.* v. *Tunnicliffe and Hampson*, [1908] A. C. 27).

In the past landowners have sometimes, in cases in which damage has appeared in their buildings or land (such as cracks in the walls of buildings or the waterlogging of land in consequence of the drainage system having been disturbed or interfered with), been faced with the difficulty of not knowing whether such damage was due to the working of the coal underneath or near their land or buildings or to some other cause, or, in cases in which the adjacent seams of coal are being worked by different colliery companies, by which of them the damage has been caused, and of being unable to ascertain this until they had commenced an action and obtained (under the Rules of the Supreme Court, Order L, rule 3) an order for inspection. Now, section 52 of the Act makes the plans in the possession of the Board of workings of coal open to the inspection of the public and entitles anyone to be furnished by the Board with a copy of or extract from any such plan on payment of the prescribed fee.

A further important provision of section 49 is a provision that no

right adverse to the title of the Board to any coal or mine of coal is to be capable of being acquired under the Limitation Act, 1939.

An attempt has been made in the foregoing to trace the progress of the nationalisation of coal and the coal industry—still the greatest (except agriculture) of our national industries—and to present a picture of its accomplishment. Such a picture is necessarily incomplete since, in common with most modern legislation, a very great deal is left to be provided for by orders, rules and regulations to be made by various officials or to be determined by certain tribunals. What the eventual outcome of this vast and audacious national experiment in State enterprise will be, time only will show. The general public, outside those connected with the industry, wearied with what appears to many of them to be only constant bickering and quarrelling between employer and employed, have regarded it almost with apathy; and, perhaps not appreciating to the full that it is a step which, in the event of its failure or non-success, can scarcely be retraced, have been content to accept it with resignation in the vague hope that, if matters cannot be made better, they at least cannot be made worse. It was formerly claimed by its most ardent advocates that with the elimination of private profit as represented by royalties and dividends, nationalisation would result in peace and contentment in the industry and cheaper coal to the consumer. It is perhaps not too much now to say that, with ever-recurring strikes in this and other industries usually resulting in increased wages and often followed by diminished output, only the most optimistic will continue to cherish that hope.

NOTES OF RECENT CASES.

1. *LAW OF PROPERTY AND CONVEYANCING.*

Registration of Business Names Act, 1916—*registration by married woman if business carried on in maiden name.*—Despite the ambiguity of para. (c) of section 1 of the Business Names Act, 1916, a Divisional Court has now held that, where a business has been carried on in the name of an unmarried woman and she marries, she must register *unless* she changes the name of her business. A man, who changes his name and his business name, must state that it was formerly carried on in another name. *This* does *not* apply to a married woman. But if she carries on the business in her maiden name she must register: *Seymour* v. *Chernikeef,* 62 T. L. R. 450.

Housing—compulsory order—hearing of evidence on appeal.—*Re Mowsley No.* 1 *Compulsory Order,* 62 T. L. R. 451, both illustrates the dangers of administrative tribunals and the real ineffectiveness to control them. Here an appeal was lodged against a compulsory order for acquisition under the Housing Act, 1936. The owner sent to the Minister notice of objection setting out the several grounds of objection, such as that the land was unsuitable for building owing to lack of water, and an offer of

alternative accommodation. The Minister, on receipt of the notice, sent the grounds of objection to the council concerned. The council gave a detailed reply on which the Minister confirmed the order.

Charles, J., quashed the order on the ground that the objector had never been given an opportunity to deduce the evidence on which his grounds of objection were based. The Minister must give a proper hearing and this was not a proper hearing unless the objector had been given an opportunity to state his case in full. Once that is done the Court cannot then interfere provided that the Minister acts without bias.

This case must be compared with *Miller* v. *Minister of Health,* 62 T. L. R. 611, where an application to quash on the same ground was refused. Here the notice of objection set out the grounds of objection, but the Minister confirmed the order. It was contended that the objector had not been given an opportunity to consider the grounds on which the council supported the order nor had he had an opportunity to elaborate his objections. It subsequently transpired that from information independently obtained the Minister had not found it necessary to consult the council and had not needed an elaboration of the objector's objections. Henn Collins, J., held that the Minister was entitled to use any information and that in acting administratively the question is not one "which can be determined on any principle of law, nor, as I see it, on any principle of natural justice, as between the Minister and any one member of the community." The result is that the order is essentially one in which as long as the Minister has some information from the side of the objector and some other information his decision is apparently unquestionable. We feel that more will be heard on this point.

Town planning—validity of clause requiring future consent.—In *Taylor* v. *Brighton Corporation,* 62 T. L. R. 561, the objector to a town planning scheme based his objection on the ground that a clause providing that no "fun fair" etc. was to be held in a certain area went on to make this prohibition conditional on consent of the council. The argument was that a scheme was dependent on the consent of the Minister and that, therefore, the retained discretion of the council was *ultra vires.* A Divisional Court refused to uphold the objection. Goddard, L.C.J., began by observing: "This case involves the consideration of some very complicated legislation, the Town and Country Planning Act, 1932, and the Town and Country Planning (Interim Development) Act, 1943." Nevertheless on a consideration of the legislation as a whole the learned Lord Chief Justice came to the conclusion that such a retained discretion was not inconsistent with the obligation of confirmation by the Minister. The principle he laid down is as follows (at p. 563): "in my opinion section 1 of the Act [1932 Act] is stating that the scheme can be made with the general object of controlling the development of land and sections 11 (1) and 12 (1) contain provisions for regulating the development or use of land, and no better means of control or regulation can be found than by providing that something shall not be done or that land shall not be used for some purpose or another, unless with the consent of the local authority. And that method is the only method of controlling and regulating".

The interesting point may occur why, if this is so, it is necessary to have a scheme. Why should not a local authority ask for a "scheme" which provides that "no act matter or thing shall be done or suffered on the land within the said area without the written consent of the local authority"? In those circumstances presumably there would be little right of appeal concerning anything. We fancy that the principle set out by the learned Lord Chief Justice will receive further illustration.

Town planning—notice to remove advertisements.—The right of the local authority to control advertisements under section 47 of the Town, etc., Act, 1932, has proved troublesome in law. In *More O'Ferrall, Ltd.* v. *Harrow U. D. C.*, 62 T. L. R. 604, a Divisional Court held that a Court of quarter sessions may not ignore that other hoardings in the locality may be removed and that the local authority may be taking steps to remove them, notwithstanding that at the date of the hearing the advertisements are still *in situ* and that, therefore, there is little immediate injury to amenity by the advertisement the subject-matter of the application. It is, of course, a question of fact whether there is serious injury to amenity, but apparently this fact must, so far as concerns other advertisements, be regarded from the angle of what may be as well as what is.

Damage to gas mains—easement and licence—nuisance.—Newcastle-under-Lyme Corporation v. *Wolstanton, Ltd.*, 62 T. L. R. 576, provides an illustration of the difficulty of ascertaining the exact nature of some statutory rights. Here the local authority owned the gas pipes laid under the Gas Works Clauses Act, 1847, s. 6. Evershed, J., held that no right of ownership or proprietorship in the land affected was created in favour of the local authority nor was any easement or other equivalent servitude. He, therefore, held that the local authority were "licensees without any title, legal or equitable, in the land itself".

These pipes were injured by subsidence in the working of mines. Evershed, J., held that notwithstanding that the authority had no proprietary rights but were only licensees they could recover damages but, apparently, on the ground that: (1) "the plaintiff corporation have, by force of statute, the exclusive right which I have defined to the possession of so much of the surface land as is occupied by their pipes and on which their pipes rest"; (2) the damage directly flowed from the interference with the natural right of support; and (3) the interference was unlawful owing to the fact that the land "had an unqualified right of support" from subjacent minerals. We have referred before to the difficulties arising from licences and the subject will be treated again, but this decision seems to introduce or to insist upon a form of licence more proprietary in character than the normal licence. It implies a division of licences in the distinction from *Malone* v. *Laskey*, [1907] 2 K. B. 141, and *Hill* v. *Tupper* (1863), 2 H. & C. 121, made in this case. It may be self-evident that the wife of a resident manager (*Malone* v. *Laskey*) and a person having the exclusive right to put pleasure boats on a canal (*Hill* v. *Tupper*) have less interest in the land than licensees who have laid gas pipes under statutes and, therefore, have less right to sue third parties, but the classification of these differences may call for further consideration.

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2. *CHARITIES.*

Gift to a named institution by will—failure of institution in lifetime of testatrix—lapse.—Re Goldney (decd.), 62 T. L. R. 587, may come as a shock to some who have tended to let the pendulum in favour of charities swing too far. Here a testatrix gave her books and half her residue "to St. Luke's Home for Children near Reading". The home was closed and the assets transferred to similar work during the life of the testatrix. Roxburgh, J., held that the gift lapsed and passed to the next-of-kin under the principle enunciated in *Re Rymer*, [1895] 1 Ch. 19. Lindley, L.J., said in that case: "But when once you arrive at the conclusion that a gift

to a particular seminary or institution, or whatever you may call it, is 'for the purposes thereof', and for no other purpose—if you once get to that and it is proved that that institution or seminary or whatever it is, has ceased to exist in the lifetime of the testator, you are driven to arrive at the conclusion that there is a lapse." This is a question of construction. The true question, as it seems to the writer, is this: "Did the testator wish to carry out a particular purpose and for that reason endow an institution which was fulfilling it, or did he wish to endow an institution of whose purpose he approved?" Assuming the former, there is a general intention of charity which will not fail and testators should always be consulted on these lines and wills drafted accordingly.

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3. *WILL CASES.*

By J. H. C. Morris, B.C.L., M.A., of Gray's Inn, Barrister-at-Law.

Lost soldier's will—evidence of contents.—It is difficult to read the case of *In the estate of MacGillivray,* 62 T. L. R. 538, without feeling some dissatisfaction with the conclusion to which the majority of the Court of Appeal felt constrained to come. The deceased, a lieutenant in the army, had obtained a decree absolute of divorce from his wife on November 16, 1942. There were two children of the marriage, a son aged eleven and a daughter aged nine; the deceased was given custody of the son and his wife of the daughter. The deceased became engaged to marry a Miss X, and on November 13, 1942, public announcement was made that the marriage would take place on November 18, 1942. Unfortunately on November 13, 1942, the very day on which the engagement was announced, the deceased was ordered abroad to take part in Operation Torch and the marriage never took place. The deceased was drowned when a troopship in which he was sailing was sunk by enemy action in September, 1943.

On or about November 19, 1942, while on board the troopship which was taking him to North Africa, the deceased made a will in his record of service army book, which was attested by a brother officer. That will was lost at sea with the deceased, but secondary evidence of its contents was available as follows. The attesting witness swore an affidavit in which he deposed that the deceased discussed the making of his will with the deponent before it was made and stated that his intention was that his fiancée, Miss X, and his son should be the beneficiaries; in what proportions or by what methods was not settled, but the intention was that Miss X should be amply provided for and that some form of trusteeship should be created for the son until he came of age; and the names of the trustees were given. Subsequently the attesting witness swore a second affidavit in which he stated that he signed the will as a witness but did not see the contents, but the testator afterwards made it absolutely clear to him that it was on the following lines: Miss X and his son to be beneficiaries, Miss X to be amply provided for, and some form of trusteeship to be created for the son until he came of age. The second affidavit said nothing about the proportions or method not being settled.

On December 2, 1942, the deceased wrote a letter to the manager of his business, which reached its destination. In that letter he said: "In the event of my being killed in action I wish you to administer the business for my heirs, *i.e.*, my son and Miss X. . . . My son's education will be Miss X's responsibility and will be paid for through the business."

On these facts it was sought to have admitted to probate, as singly or

together constituting his last will, the deceased's letter to the manager of his business and his statements to his brother officer. The Court of Appeal, consisting of Scott, Somervell and Cohen, L.JJ., held (1) unanimously, reversing Warrington, J., and following *Re Beech,* [1923] P. 46, that the letter could not be admitted to probate because it was not testamentary in character or intention: the deceased had already made his will, and the letter merely gave administrative instructions to the manager of his business; (2) Scott, L.J., dissenting, that the statements made to the attesting witness were not sufficiently cogent evidence of the contents of the lost will to enable probate to be granted. The majority admitted that the deceased's manifest intention was that the only beneficiaries should be Miss X and his son. But the witness's first affidavit showed clearly that the deceased had not made up his mind in what proportions the two beneficiaries were to take, and the reference to "methods" suggested some limitation on their interests, *e.g.,* that Miss X should have only a life interest, or the son an interest determinable if he died under twenty-one. The witness's second affidavit did not justify the Court in assuming that the deceased had abandoned this intention.

In a forceful dissenting judgment, Scott, L.J., made two points to which, it is submitted, the majority gave no adequate reply: (1) this was a soldier's will, and Parliament undoubtedly had in mind the national importance of giving effect to the last wishes, however informally expressed, of those who in war give their lives for their country; consequently, the Court had a "plain judicial duty" to give effect to the wishes of the deceased; (2) if the will had not been lost, but had been found to contain exactly what the deceased told the attesting witness it did contain, the vagueness of its provisions would not have prevented it from being admitted to probate, though its interpretation might have had to be elucidated by a Court of construction.

It is undoubtedly true, as Lord Herschell said in *Woodward* v. *Goulstone* (1886), 11 App. Cas. 469, 475, that secondary evidence of the contents of a lost will "ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator". But in the case in which these words were spoken, the secondary evidence was of the flimsiest character; moreover, it was propounded by the residuary legatee, who admitted that he could not remember the amounts of some of the legacies. In the instant case the witness was quite disinterested, and there was no suggestion that the deceased had any other beneficiaries in mind except the two he mentioned. In the leading case of *Sugden* v. *Lord St. Leonards* (1876), 1 P. D. 154, probate was decreed on the secondary evidence of Miss Sugden, although she was one of the residuary legatees, although she made no attempt to repeat the technical conveyancing language in which Lord St. Leonards had couched his limitations of real estate, and although she could not remember some of the ulterior remainders or some of the legacies.

If the evidence of the deceased's testamentary intentions had consisted solely of the letter which he wrote to the manager of his business, the majority of the Court of Appeal would have admitted the letter to probate. If he had made no written dispositions at all, but had simply stated to his brother officer that he desired to benefit his son and Miss X, it can scarcely be doubted that his oral declaration would have been admitted to probate as a soldier's will. But in the events which happened, the result was to confer a windfall on persons who had no claim whatever on his bounty. The only comfort which can be derived from the decision is that the Court stated categorically that it was bound to hold that statements made by a

testator after the execution of his will are admissible to prove its contents, notwithstanding the doubts expressed in *Woodward* v. *Goulstone* on that part of the decision in *Sugden* v. *Lord St. Leonards*.

(Theobald 46, 49.)

Distribution of realised capital profits by company—whether capital or income.—In *Re Doughty*, 62 T. L. R. 525, a company had power under its articles of association by resolution to divide surplus capital moneys or capital profits in its hands (whether arising from the realisation of capital assets or received in respect of any capital assets or represented by shares or other property received as consideration for the sale or realisation of any of its capital assets) amongst its members by way of capital distribution in proportion to their rights and interests in the profits of the company. Subsequently the company passed a resolution that there should be declared out of realised capital profits an additional dividend or distribution to management and ordinary shareholders of £99,100 in respect of the year ended December 31, 1945. Roxburgh, J., held that the article authorising capital distribution was valid and effective and that the moneys must be treated as between tenant for life and remainderman as capital and not as income. He followed *Re Ward's Will Trusts*, [1936] Ch. 704, and distinguished *Re Bates*, [1928] Ch. 682, and *Hill* v. *Permanent Trustee Company of New South Wales*, [1930] A. C. 720. The distinction between these cases turns solely on the construction of the company's articles of association. In *Re Bates* and *Hill* v. *Permanent Trustee Co.* there was no article authorising capital distribution. In *Re Ward* and *Re Doughty* there was.

(Theobald 446.)

Gift of shares—reconstruction of company—whether gift adeemed.—*Re O'Brien*, 62 T. L. R. 594, is another of those difficult cases on whether a gift of shares in a company is adeemed by a reconstruction of the company which has the effect of converting the shares into others of a different denomination.

The testator made a specific bequest of 5,200 of his shares in a company " or such shares or cash or shares and cash as the case may be which may be allotted or transferred to me or to my trustees in substitution therefor in any company with which the said " company " may be amalgamated or reconstructed or to which its assets may be sold or transferred or otherwise ". At the date of his will the testator owned 6,201 ordinary shares. Subsequently the company resolved to capitalise a sum of undivided profits and issued to the testator 10,325 further ordinary shares by way of bonus, credited as fully paid. Later still the company subdivided its ordinary £1 shares into four preferred ordinary shares of 4s. each and one deferred ordinary share of 1s. each. Roxburgh, J., held (1) following *Re Kuypers*, [1925] Ch. 244, that the bonus shares did not pass under the bequest; they were wholly new shares, not an accretion to the shares given by the will; (2) following *Re Leeming*, [1912] 1 Ch. 828, that the preferred ordinary and deferred ordinary shares passed under the bequest, because they were substantially the same thing as the original ordinary shares, changed in name or form only.

There were further complications. The testator agreed to sell some of his new shares, reserving an option to repurchase them which he subsequently exercised in part; he next sold others, without reserving any option to repurchase; and he then purchased some additional shares. It was held

(1) that the shares actually repurchased under the option were capable of passing under the bequest; (2) that the additional shares purchased did not pass under the bequest; and (3) that the shares sold and not repurchased under the option must be treated as having been drawn rateably from original and bonus shares.

There has been some rather inconclusive discussion of the question raised by (2) above, with special reference to section 24 of the Wills Act, 1837, which makes a will speak from death unless a contrary intention appears. "Suppose", said Jarman (*Wills*, p. 387), "that a testator, having a house in Grosvenor Square, bequeaths it by the description of his messuage in such square, and afterwards sells the property, and purchases another house in the same square, of which he is possessed at his decease, the bequest will comprise the new acquisition by force of" section 24. And in *Castle* v. *Fox* (1871), 11 Eq. 542, 551, Malins, V.-C., had "not a doubt about it" that Jarman's view was correct. Other Judges, however, have striven to find a more reasonable meaning in the section; and Theobald (*Wills*, p. 99) suggests that if the testator gives a particular and specific thing which he has at the date of the will, there is a contrary intention within the meaning of the section. The decision of Roxburgh, J., lends weight to Theobald's view; but as the learned Judge gave no reasons, the controversy cannot be regarded as settled.

(Theobald 141–142, 108.)

Home-made will—gift by implication.—In *Re Lane*, 115 L. J. Ch. 195, the testator, obviously a man of substance and intelligence, in a singularly ineptly-drawn home-made will gave £2,000 to his sister "for life use, to revert to my estate if she does not remarry". After the death of the testator his sister did remarry and claimed to be absolutely entitled to the legacy. Roxburgh, J., held that she was so entitled. The direction that the legacy should revert to the estate contemplated that the sister might have acquired some interest beyond her life, since otherwise the legacy would have reverted in any event.

(Theobald 621.)

Gift over on failure of issue to attain twenty-one—exclusion of children of proposed marriage—whether gift over takes effect.—Re Crawshay, 62 T. L. R. 585, is a case with several interesting features. The testator died as long ago as 1879. A benevolent Court of construction interpreted his will consistently with what he must have meant, but not consistently with what he literally said. In doing so it came to the rescue of an obviously competent professional draftsman, who somehow failed to provide for a contingency which obviously he should have anticipated.

By his will the testator settled a sum of £100,000 on usual trusts for the benefit of his daughter Rose for life and after her death for the benefit of her children. He then declared that should there be no child of Rose who attained twenty-one, the fund should be equally divided between such children of her brothers and sisters as should be living at her decease. By a codicil to his will the testator recited that his daughter Rose was engaged to be married to a Mr. Williams and that he disapproved of such marriage. He then declared that none of Rose's children by the said Mr. Williams should take any share in the fund, but that the will should be read as if all such children had been expressly excluded from all benefit therein.

Undeterred by her father's testamentary threats, Rose married Mr. Williams and had two children who attained twenty-one. When she

died, these two children obviously were not entitled to the fund, because the codicil expressly excluded them from all benefit therein; but did the fund go to Rose's nephews and nieces, or was there a lapse? In favour of the second alternative was the undoubted fact that, according to the strict wording of the will, the event on which the gift over to the nephews and nieces was to take effect had not happened. They were only entitled should there be no child of Rose who attained twenty-one, and Rose had two such children.

There can be little doubt that in the events which happened the testator intended the nephews and nieces to share the fund, in spite of the inaccurate language of his draftsman. It was very unlikely that he really intended that if Rose married Mr. Williams and never had a child, the fund should go to the nephews and nieces, while if she married Mr. Williams and had a child who attained twenty-one, the fund should fall into residue. Accordingly, Vaisey, J., felt able to construe the draftsman's language as equivalent to "failing the preceding trusts" (following *Ellicombe* v. *Gompertz* (1837), 3 My. & Cr. 127). He was naturally confronted with a long line of cases in which the gift over failed because the exact event on which it depended did not happen. Fortunately he was able to distinguish them, although he admitted that the present case was very near the line.

The learned Judge was assisted in reaching this conclusion by the circumstance that the will itself contained a discrepancy which had to be resolved by reference to the preceding trusts. The trust for the benefit of Rose's children was for such of them who being sons should attain twenty-one or being daughters should attain that age or marry under that age *with the consent of her parents or guardian*. On the other hand, the gift over to the nephews and nieces was dependent on there being no child of Rose who, being a son, should attain twenty-one or, being a daughter, should attain twenty-one or marry under twenty-one (nothing being said about consent). Consequently, quite apart from the codicil, a similar difficulty would have arisen if Rose had had no son but one daughter who married under twenty-one without consent. That daughter would have taken no interest in the fund, and yet literally the event on which the gift over depended would not have happened.

(Theobald 597.)

Rule in Howe v. *Lord Dartmouth—date when value of unauthorised investments ought to be calculated—rate of interest.—Re Parry*, 62 T. L. R. 543, looks like becoming a leading case on the rule in *Howe* v. *Lord Dartmouth*. The estate was a very large one, and Romer, J., delivered an elaborate judgment.

The testator, who died in 1936, gave his real and personal estate to trustees on trust for sale and conversion, with an absolute discretion to postpone sale and conversion for so long as they should think fit, and settled the income on two successive tenants for life with remainders over. The estate included many investments which were of a non-trustee character and not authorised by the investment clause in the will. Some of these unauthorised investments were sold during the first year after the testator's death, others were sold subsequently, and others were retained under the power to postpone conversion. The unauthorised investments did not include any wasting assets such as leaseholds. They greatly increased in value during the first year after the testator's death. The questions were (1) assuming that the rule in *Howe* v. *Lord Dartmouth* (1802), 7 Ves. 137a, applied, whether the unauthorised investments ought to be valued as at the date of the testator's death, or on the expiration of one year from then; (2) whether the tenant for life was entitled to interest

on the investments so valued at the rate of 4 per cent. or at some lower rate. Counsel for the tenants for life argued that from the first appearance of the rule in *Howe* v. *Lord Dartmouth* and the companion rule applicable to trusts for sale, the proper time for making the valuation was always the first anniversary of the testator's death, until Lord Cairns in *Brown* v. *Gellatly* (1867), L. R. 2 Ch. App. 751, threw the settled practice of the Court into confusion by making the valuation as at the date of the death; and that Kekewich, J., took the wrong turning in *Re Woods*, [1904] 2 Ch. 4, and later Judges followed him without full argument. This far-reaching argument made it necessary for Romer, J., to examine the origin and history of the rule, and his conclusions may be tabulated as follows:—

(1) Where residuary personalty was settled by will, and there was no sufficient indication that the testator intended the tenant for life to enjoy the property in specie, the Court sought to do justice between all parties and to preserve that balance which the testator must have intended, and accordingly assumed a hypothetical conversion of hazardous or wasting property into safe and lasting securities.

(2) Where there was an express trust for sale, this notional conversion was assumed to be made on the first anniversary of the testator's death. The testator had himself contemplated and directed conversion, the executors were bound to effect it, and the "executors' year" was taken as the period within which their duty could reasonably be performed. In other words, the fixing of the time for the notional conversion became related to the performance by the executors of their normal administrative functions.

(3) Where there was no trust for sale the same point of time was selected by parity of reasoning.

(4) In *Brown* v. *Gellatly*, where the executors had power to realise the estate when and in such manner as they might see fit, and also power to sail the testator's ships for the benefit of the estate until they could be satisfactorily sold, Lord Cairns drew a clear-cut distinction between the general unauthorised investments on the one hand and the ships on the other; he directed that the ships must be valued as at the date of the death, and that the tenant for life was only entitled to interest at 4 per cent. on such value. The ships were to be sailed for the benefit of the estate as a whole; they were to be converted cautiously, but there was no breach of trust if conversion was delayed.

(5) Property given on trust for sale with an unfettered power to postpone stands in the same position as the ships in *Brown* v. *Gellatly*: if the executors retain unauthorised investments in the *bona fide* exercise of their discretion, they do so for the benefit of the estate as a whole, and no breach of trust is committed.

(6) If there is no duty on the executors to sell at once, or within a year, or at any other time, there can be no reason to assume a notional conversion at once, or within a year, or at any other time. Yet the essential equity remains equally compelling, that a balance should be struck between tenant for life and remainderman, even when there is no immediate duty to convert and property is retained for the benefit of the estate as a whole. And no more rational date for the valuation of the assets can be selected than the date of the testator's death.

(7) It followed that *Brown* v. *Gellatly* was not open to attack on this point as suggested by counsel for the tenant for life, and afforded a satisfactory foundation for the orders in *Re Woods*, [1904] 2 Ch. 4, *Re Chaytor*, [1905] 1 Ch. 233, *Re Owen*, [1912] 1 Ch. 519, *Re Beech*, [1920] 1 Ch. 40, and *Re Baker*, [1924] 2 Ch. 271. In the latest case on the subject, *Re Fawcett*, [1940] Ch. 402, Farwell, J., directed that the unauthorised investments should be valued as at the end of one year from

the death. But in that case the essential difference was that the trust for sale contained no power to postpone; and Farwell, J., twice pointed out that if there had been, different considerations might have arisen.

(8) The rate of interest in calculations between tenant for life and remainderman used to be 4 per cent. At the beginning of the present century the Courts only allowed 3 per cent., but in *Re Beech* Eve, J., raised the rate to 4 per cent. again, and it has remained there ever since. In the present case there was evidence that in September, 1936, the date of the testator's death, the fair average yield from trustee securities was £3 12s. 2d., ranging from £3 5s. 6d. to £3 19s. 6d. Accordingly, Romer, J., following *Re Fawcett,* did not feel justified in lowering the rate once more. He emphasised that he did not have to consider what the rate should be in the case of a testator dying in 1946.

Counsel for the tenant for life formally took the point that neither the rule in *Howe* v. *Lord Dartmouth* nor the corresponding rule applicable when there is a trust for sale (sometimes called the rule in *Gibson* v. *Bott* (1802), 7 Ves. 89) ought to be applied in the present case. They admitted that they could not argue the point in a Court of first instance, but reserved the right to argue it in a higher Court. One would have thought that the point was scarcely open to argument in any tribunal short of the House of Lords.

(Theobald 449, 453, 454.)

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4. *FAMILY LAW CASES.*

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law.

Divorce—husband's cruelty due to wife's refusal to obey unreasonable orders—Meacher v. *Meacher,* [1946] 2 A. E. R. 307.—The Court of Appeal (Morton, Bucknill and Somervell, L.JJ.) in this case corrected an interpretation of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, and the Matrimonial Causes Act, 1937, ss. 2 and 6, which Henn Collins, J., had given on the question of cruelty. The respondent husband objected strongly to his wife, the petitioner, visiting her own sister, and forbade her to do so. On several occasions when, despite the respondent's orders, the petitioner visited her sister, the respondent assaulted her violently, leading ultimately to a nervous breakdown. Henn Collins, J., dismissed the wife's petition for divorce on the grounds of cruelty, since the Court would only intervene to protect her against future acts, which it lay in her own power to prevent.

The Court of Appeal, in granting a decree, refused to accept the view that the Acts of 1925 and 1937 had the effect of restricting the incidence of cruelty in time, and followed the well-known principle laid down by that Court in *Russell* v. *Russell* (1897), 66 L. J. P. 122, which treated as cruelty violence either actual *or* apprehended. The Court was equally unprepared to allow a husband to justify maltreatment of his wife by a plea that she had disobeyed his unreasonable orders. The Court assumed in this case that the orders prohibiting the petitioner from visiting her sister were in fact unreasonable; but there seems little doubt that cruelty, at least of a physical kind, resulting from a wife's disobedience of perfectly reasonable orders could no more be justified in a Court to-day than cruelty based on facts similar to those in *Meacher* v. *Meacher.* Although it was

unnecessary for the Court to decide this point, the very modified common law view of the husband's right to chastise his wife, a right which, it is submitted, no longer exists, would render the question of reasonableness of his orders irrelevant to that of consequential cruelty.

(Latey, 13th ed., pp. 74, 75.)

Divorce—desertion while husband and wife living in the same house—Wanbon v. *Wanbon,* [1946] 2 A. E. R. 366. In this case the husband successfully petitioned for divorce on the ground of his wife's desertion. Though the petition was undefended, the case is of interest on the facts constituting desertion and on the more liberal application of the law which it exemplifies. For a period of at least ten years prior to the petition (except for a short interval of six months, when the parties were living apart), husband and wife had lived together in the same house. The wife had not only continuously refused marital relations, but had refused to perform any wifely duty whatever for her husband. Although Pilcher, J., thought that a Court could rarely find desertion proved where the parties had lived in the same household, he was satisfied that the present case was " one of the rare instances " in which it would be proper to grant a decree.

(Latey, pp. 93, 94.)

King's Proctor—intervention after decree nisi of nullity—onus of proof —Bluff v. *Bluff,* [1946] 2 A. E. R. 63.—The petitioner in this case had obtained a decree *nisi* of nullity on the ground of the respondent's wilful refusal to consummate the marriage. The petition was undefended, and after the date of the decree the King's Proctor alleged that the marriage had been consummated, and that thereupon the case should be re-opened and the petitioner should satisfy the Court that the marriage had not been consummated. Willmer, J., upheld this argument, overruling the petitioner's contention that the burden of proof was on any person alleging the consummation of the marriage. The learned Judge supported his decision on the ground that, the petition being undefended, he had heard only one side of the case; and that in such a case the matter raised " goes to the same subject as forms the petitioner's prayer for a decree ". He accordingly dismissed the petition because he thought the marriage had been consummated, though he " would not like to say that the respondent has proved it " to him. The learned Judge distinguished the case of intervention after a decree *nisi* of divorce based on adultery, where the onus of proof would be on the King's Proctor.

This remarkable decision, throwing on the petitioner the duty of proving, at least twice, a negative, namely, the fact of non-consummation, necessarily implies that the Judge granting the decree *nisi* did so without being satisfied that the grounds for such a decree had been proved, so that the mere allegation of consummation, made after granting of the decree and unsupported by any evidence, would be sufficient to justify dismissing the petition. But decrees are not made unless a Judge is satisfied that the evidence justifies their making; and it seems wrong in principle not to place on a person making an allegation the duty of proving it. In *T.* v. *T.* (*King's Proctor showing cause*) (1908), 24 T. L. R. 580, a nullity decree was rescinded *on proof* of consummation.

(Latey, p. 186.)

Husband and wife—whether husband liable for (a) medical fees, and (b) funeral expenses, incurred by wife's executors on her behalf—effect on husband's common law liability of statutory changes—Rees v. *Hughes*, [1946] 2 A. E. R. 47.—The decision of the Court of Appeal (Scott, Morton and Tucker, L.JJ.) in this case is important in that it changes the common law in respect of a husband's liability to bury his wife and bear the expenses of her funeral (see Eversley, *Domestic Relations*, 5th ed., p. 216). The appellant's wife for some time before her death had lived with, and been cared for by, the respondents, whom she had appointed executors of her will. Without reference to her husband the respondents had incurred expenses for medical attention to the wife, and on her death had arranged and paid for her funeral. The deceased wife left sufficient estate to cover all these expenses, but her will contained no direction as to their payment. The executors obtained judgment in the county court against the husband for payment of both items of expense, and the husband appealed.

The two heads of claim involved somewhat different considerations. In the county court the husband's liability for the medical expenses had been based on their character of "necessaries"; but Scott, L.J., pointed out the irrelevance of this classification if, as was the fact here, the services had not been rendered on the strength of the husband's credit. "As the wife was ill as a *feme sole*, the *prima facie* presumption of law is that credit was given to her and not to her husband" (*per* Scott, L.J., at p. 51). Tucker, L.J., disposed shortly of the point in holding that, if the medical expenses were the wife's liability, her estate was liable; if they were the husband's liability, they should not have been paid by the executors, and since the executors had done so under no legal compulsion and without any request from the husband their claim must be dismissed. But in either case this neat argument proceeded on the assumption that the medical fees "must have been a liability either of the husband or the wife" (*per* Tucker, L.J., at p. 51). It is at least arguable, however, that, in the absence of proof of a request from the wife, the wife (or her estate) is equally incapable of being made liable for such expenses, and that the executors should have borne them personally. The argument serves to illustrate the logical absurdity of the harsh principle that money paid voluntarily under mistake of law is not recoverable.

The issue of liability for the wife's funeral expenses was more involved. The respondent executors founded their claim on a long-established common law doctrine and a line of precedents whose only weakness was their age. The common law liability of the husband to bury his wife was never questioned, but the Court unanimously held that this liability had been extinguished, at least *where the wife left property of her own*, by the cumulative effect of the Married Women's Property Act, 1882, s. 1 (1); the Administration of Estates Act, 1925, s. 32 (1), s. 33 (1) (2) and (7), s. 34 (1) and (3), s. 46 (1) and Schedule I, Part I, r. 1; and the Law Reform (Married Women and Tortfeasors) Act, 1935. Before those Acts, "the wife being by marriage completely identified with her husband and having at law no property of her own, and no separate power of disposition, the duty of burying her body inevitably fell at common law on her surviving husband" (*per* Scott, L.J., at p. 49). Since the Acts the original reasons imposing the duty of burial had passed away, and the wife now dies, as to property, as a *feme sole*. In support of this reasoning the Court cited the legal maxim, "*cessante ratione legis, cessat lex ipsa*", and "*Reason is the soul of law, and when the reason of any particular law ceases, so does the law itself*", to which, one might add, that reason does not repeal out-of-date statutes, and that there is a principle of interpretation of statutes which raises a presumption against their interference with the

common law (*Arthur* v. *Bokenham* (1708), 11 Mod. 150; *Secretary of State for India* v. *Bank of India* (1938), L. R. 65 I. A. 286, at p. 298, *per* Lord Wright).

(Eversley, *Domestic Relations*, 5th ed., p. 216.)

Husband and wife—nature and purpose of Army separation allowance —whether wife has lien on property purchased with the allowance—Re Sims' Question, [1946] 2 A. E. R. 138.—The wife in this case issued a summons under the Married Women's Property Act, 1882, to determine the extent of her interest in a freehold house and furniture, the house being subject to a building society's mortgage and the furniture to various hire-purchase agreements. The parties were married in 1938, and in 1939 the husband purchased a house, while his wife entered into hire-purchase agreements in respect of the furniture. On being recalled to military service in 1939 the husband gave the wife his savings and asked her to keep up all necessary instalments, which she did. During the husband's service the wife received 14s. weekly from him and 18s. weekly from the State as separation allowance, and applied this and money from her own earnings towards payment for the house and furniture. After the husband's discharge differences resulted in a sale of the house and furniture, and the wife claimed a lien for her contribution towards the cost.

Wynn-Parry, J., deciding against the wife's claim, emphasised the equitable nature of the lien which she claimed and stressed the fact of her inability to show that any particular payment had been made out of a fund which was her own property. The object of the Army allowance was a matter of compensating "not merely the wife, but both parties, and in particular the husband" for ceasing to be a wage-earner and having to serve at what was nicely described as "a comparatively low rate of remuneration". In the view of equity the allowance was paid to enable the wife to keep herself and the home going during the husband's absence. It was not her specific property, and her claim to a lien accordingly failed.

(Eversley, *Domestic Relations*, 5th ed., pp. 319, 320.)

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5. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

Estate duty—residuary estate—beneficiary entitled to corpus on attaining age of twenty-five—death under that age after attaining age of twenty-one —Trustee Act, 1925, *s.* 31 (1)—*Finance Act*, 1894, *s.* 2 (1) (*b*).—In *Re Jones' Will Trusts, Soames* v. *Att.-Gen.*, [1946] W. N. 148, a question arose as to the application of section 2 (1) (b) of the Finance Act, 1894, on the death of a person who had, by virtue of section 31 (1) (ii) of the Trustee Act, 1925, become entitled to the income of a testator's residuary estate but had died before acquiring a vested interest. The will provided (*inter alia*) that the residuary estate should be held on trust for A, but so that he should not acquire a vested interest until he attained the age of twenty-five. A attained the age of twenty-one and thereupon became entitled, under section 31 of the Trustee Act, to receive the income of the residuary estate. He died before attaining the age of twenty-five. On his death estate duty was claimed on the property comprised in the residuary

estate on the footing that there had been a cesser of interest within the scope of section 2 (1) (b) above. In opposition to this claim, it was contended that the case fell within the exemption in section 5 (3) of the 1894 Act, which provides that " in the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death ". Roxburgh, J., agreed that it was arguable that A's interest in the income did not arise under the settlement but under the Trustee Act, and that, on that view, his interest under the settlement could be said to have failed before becoming an interest in possession. The learned Judge pointed out, however, that this line of argument could be of no avail, since the exemption applied only where the interest which ceased was an interest under the settlement. If, on the other hand, the interest in the income did arise under the settlement it was impossible to say that it had not become an interest in possession. The dilemma was inescapable, and on neither view could the exemption be successfully invoked. The learned Judge went on to observe that the case was clearly distinguishable from *Att.-Gen.* v. *Power,* [1906] 2 I. R. 272, which was concerned with discretionary powers of maintenance exercisable by trustees during a minority. It was there held that the mere existence of such powers does not enable it to be said that there has been a cesser of interest on the infant's death. The present case raised an entirely different question, *viz.*, whether there was a cesser of interest on the death of a person contingently interested in the property in question, and, by virtue of the Trustee Act, entitled as of right to receive the income of that property. The learned Judge had no hesitation in holding that, where this was the position, there was a cesser of interest within the scope of section 2 (1) (b) and that estate duty was exigible accordingly.

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6. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

Income tax—periodical payments described as loans—whether annual payments subject to deduction of tax—Income Tax Act, 1918, *General Rule* 21.—For income tax purposes the character of a payment is not conclusively determined by the label affixed to it by an interested party, and a series of payments masquerading as " loans " may fall, nevertheless, to be treated as annual sums attracting tax. This is the effect of the decision in *C. I. R.* v. *Wesleyan and General Assurance Society* (1946), 90 S. J. 479, which turned on a contract between the assurance society and the purchaser of an annuity. In consideration of a lump sum payment, the society covenanted to pay an annuity of fixed amount. It also covenanted that on the death of the annuitant it would pay a sum equal to a stated amount for each completed month from the coming into force of the contract to the date of death. Further, the annuitant was to be entitled to borrow from the society, on the twenty-fifth day of each month, such amount as he might request, not exceeding the amount which would have been payable had he died on that date. No interest was to be charged on such loans, and they were not to be repayable to the society until the death of the annuitant, when the society would recover them out of the sum then payable, as provided in the contract. Taking advantage of this

privilege, the annuitant borrowed each month the full amount of the loan to which he was entitled. The annuity was paid by the society under deduction of tax, but tax was not deducted from the amounts paid by way of "loan", with the result that the society found itself faced with Rule 21 assessments in respect of those payments. The assessments were discharged on appeal to the Special Commissioners, but were restored by Macnaghten, J., who pointed out that the so-called "loans" had none of the characteristics of a "loan". They bore no interest and were not, in fact, recoverable, since monthly "loans" of the maximum permissible amount would leave nothing to be paid at the annuitant's death. Accordingly, the learned Judge, brushing aside the formula intended to stamp the payments with the character of loans, held that, in truth and in fact, they were not loans, but annual sums within the meaning of the Income Tax Acts. The case is understood to be under appeal and more may be heard of it in due course.

Income tax—purchases of endowment policies on lives of other persons —purchases planned to produce fixed sum annually—whether profits of trade within statutory definition—Income Tax Act, 1918, *s.* 237 *and Rules of Case I of Schedule D.*—The appeal in *Smith Barry* v. *Cordy* (1946), 62 T. L. R. 614, in which the Court of Appeal reversed the decision of Macnaghten, J. (*sub nom. Cordy* v. *Smith Barry,* 61 T. L. R. 376), in favour of the taxpayer, presented some unusual features and led to a result which is likely to be tested in the House of Lords. The essential facts are simple. Over a period of about eighteen months in 1937–1939 the taxpayer had accumulated by purchase a large number of endowment policies on the lives of other persons. The policies were selected in such manner that, according to the taxpayer's calculations, they could be relied upon to bring him in £7,000 a year until he reached the age of seventy-four. The scheme was skilfully worked out and produced the expected results until it was abandoned in 1942, when some of the policies were given away as presents and the remainder sold. On these facts the question arose whether the difference between the moneys received by the taxpayer under the policies as they matured in successive years and the amounts paid for them when they were purchased represented income chargeable with tax under Schedule D. The Appeal Commissioners found as a fact that they were profits arising from an adventure or concern in the nature of trade and decided that they were taxable accordingly. Macnaghten, J., took a different view and allowed the taxpayer's appeal on the ground that there was no evidence to warrant the Appeal Commissioners' finding. The Court of Appeal unanimously agreed with the Appeal Commissioners and reversed the judgment of Macnaghten, J., but gave leave to appeal to the House of Lords. In delivering the judgment of the Court, Scott, L.J., made some important observations on the definition of "trade" in section 237 of the Income Tax Act, 1918: "'trade' includes every trade, manufacture, adventure or concern in the nature of trade". He pointed out that, since the word "trade" itself figures in the definition, the other words must be intended to cover more than trade in the sense in which it is ordinarily understood. The whole tendency of tax legislation and judicial decisions had been, he said, not to restrict but rather to enlarge the scope of Schedule D, and no narrow view ought to be taken of what constituted trade for the purposes of tax under that Schedule. In the case under consideration there was ample evidence to support a finding that the taxpayer had engaged in an adventure or a concern in the nature of trade; the large number of policies bought, and the elaborate calculation of the

receipts to be expected in successive years, pointed clearly in that direction. The policies could not truly be described as investments, nor was it material that the profits did not arise from sales, for the profits taxable as profits of a trade are not confined to those which arise from buying and selling. Not only was the Appeal Commissioners' finding upheld, but Scott, L.J., went so far as to say that he doubted whether any other inference of fact was open to them.

Income tax — tax-free annuity — whether provision made before September 3, 1939—Finance Act, 1941, s. 25.—The decision of the House of Lords in *Berkeley* v. *Berkeley* (1945), 175 L. T. 153, sets at rest the doubts which have long existed as to the effect of section 25 of the Finance Act, 1941, in a case in which the provision for the tax-free annual sum was contained in a will or codicil made before the crucial date—September 3, 1939—by a testator who died after that date. In *Re Waring, Westminster Bank* v. *Awdry,* [1942] Ch. 426, the Court of Appeal, reversing the decision of Farwell, J., held that the "provision" was "made", within the meaning of paragraph (b) of sub-section (1) of section 25, above, when the document containing the relevant testamentary disposition was executed, and that, consequently, the date to be considered was not the date of the testator's death but the date of the will or codicil under which the annual sum was payable. It was held, further, that, where a testator, after bequeathing the tax-free annual payment by his will, had subsequently made a codicil dealing with other matters and not expressly confirming the will, the relevant date was the date of the will and not of the codicil. It was intimated by the Court that different considerations might arise in the case of a codicil which did expressly confirm an earlier will. The effect of such a codicil was considered in *Re Tredgold, Midland Bank* v. *Tredgold,* [1943] Ch. 69, where it was held by Simonds, J. (as he then was), that the confirmation of the will by the codicil must be treated as a republication of the will, and that, the codicil having been made in 1941, section 25, above, was inapplicable, notwithstanding that the will had been made in 1936. This decision was, however, overruled by the Court of Appeal in *Re Sebag-Montefiore, Sebag-Montefiore* v. *Alliance Assurance Co.,* [1944] Ch. 331, where section 25, above, was held to apply to a tax-free annual sum bequeathed by a will made before September 3, 1939, notwithstanding the express confirmation of the will by a codicil made after that date. All these decisions have become obsolete now that it has been laid down by the House of Lords, in *Berkeley* v. *Berkeley,* above, that where the "provision" is "contained" in a will or codicil, it must be considered to have been "made" at, and not before, the testator's death. It was pointed out in the House of Lords that the test prescribed by the statute is whether the "provision" was "made" before September 3, 1939—not whether it was "contained" in a document executed before that date. The word "provision" is, in itself, ambiguous, but, on the true construction of section 25, it must—it was held—be taken to refer to the benefits conferred and not to the contents of the document or oral contract defining them. In the case of a will or codicil, no benefit was conferred, and no vested interest was created, until the testator's death. Hence, though, in one sense, provision for the payment of a testamentary annuity might be said to be "made" on the execution of the will or codicil, the "provision" was not "made" within the meaning of section 25 until the thing provided came into existence at the moment when the testamentary disposition took effect.

Income tax—Order under Inheritance (Family Provision) Act, 1938—*will made before September* 3, 1939, *by testator who died after that date—Finance Act,* 1941, *s.* 25.—In *Re Pointer, Shonfield* v. *Edwards,* [1946] Ch. 324, a short point arising under the Inheritance (Family Provision) Act, 1938, was disposed of in the light of the decision in *Berkeley* v. *Berkeley,* which is the subject of the immediately preceding note. An Order under the Inheritance (Family Provision) Act had been made in 1940 in respect of the estate of a testator who died in December, 1939, leaving a will dated March 30, 1938. It was contended by the trustees of the will that section 25 of the Finance Act, 1941, applied so as to reduce the annual sum payable under the Order to twenty twenty-ninths of the stated amount. Wynn Parry, J., said that it was clear that the position of a dependant in whose favour an Order had been made under the Inheritance (Family Provision) Act was the same, for all purposes, as that of a beneficiary under the will. Applying the decision in *Berkeley* v. *Berkeley,* the learned Judge held that the " provision " must be taken to have been " made " at the moment of the testator's death, and that, since the Order related to the estate of a testator who died after September 3, 1939, it followed that section 25 of the Finance Act, 1941, did not operate to reduce the amount specified in the Order.

Income tax—" married woman living with her husband "—" married woman living separate from her husband "—Income Tax Act, 1918, *General Rule* 16.—Light is thrown on some of the more obscure provisions of Rule 16 of the General Rules, which relates to the tax position of married women, by *Nugent-Head* v. *Jacobs* (1946), 62 T. L. R. 620, in which the judgment of Macnaghten, J., 62 T. L. R. 66 (see *The Conveyancer,* March, 1946, at pp. 179–180), has now been reversed by the Court of Appeal, leave being granted to appeal to the House of Lords. The case turned on the provisoes to rule 16, of which the first is that which requires the profits of " a married woman living with her husband " to be deemed the profits of the husband. The second proviso then lays it down that " a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise ", is, in respect of income from abroad, to be charged as a *feme sole,* if entitled to the income in her own right, and as the agent of her husband, " if she receives the same from or through him . . .". In *Nugent-Head* v. *Jacobs,* above, Macnaghten, J., came to the conclusion that the second proviso refers, and refers only, to cases in which the spouses are separated in the ordinary sense of that word, and does not cover cases in which they are *de facto* living apart from force of circumstances and not because of any impairment of their matrimonial relations. The mysteries of rule 16 have now been further investigated by the Court of Appeal, which has come to a different conclusion, holding that, read in the context of the rule as a whole, the second proviso can best be given an intelligible meaning by taking it to apply to cases in which the spouses are, in fact, living apart, not because they have decided or desire to separate, but because they have been involuntarily parted. In other words, the second proviso is to be construed as qualifying the first to the extent of prescribing special treatment for the income from sources abroad of a married woman who, though living with her husband in the sense that the matrimonial relationship subsists unimpaired, is not, in fact, living in the same place as her husband. In reaching this conclusion, Scott, L.J., commented upon " the extraordinary ambiguity of the language used in proviso (2) of rule 16 ", and Somervell, L.J., observed that " it is unfortunate that a rule which has such a wide application should be left in this state ".

Income tax—tax free annuity—immunity from tax up to 5s. in the pound—whether beneficiary entitled to retain tax repaid in respect of reliefs and allowances.—In *Re Bates,* [1946] Ch. 83, the application of the rule in *Re Pettit,* [1922] 2 Ch. 765, was considered in a case in which a testator had bequeathed certain annuities "clear of . . . income tax up to but not exceeding 5s. 6d. in the pound but not surtax". It was held by Romer, J., that the rule in *Pettit's Case,* above, applied and that a proportion of the tax repaid to the annuitant in respect of reliefs and allowances must be paid over by them to the trustees. *Re Bates,* above, was distinguished in *Re Arno,* [1946] 2 A. E. R. 278, where the language to be construed, though somewhat similar, was not precisely the same. The testator's directions, in a will made in 1937, were that the annuities should be paid "without deduction of income-tax up to a maximum of 5s. in the pound". On these words, it was held by Roxburgh, J., that the rule in *Pettit's Case* was inapplicable. The learned Judge pointed out that, in contrast with the formula employed in *Re Bates,* above, there was here an express reference to deduction of tax, and this was not reduced in significance by a mention of surtax—a point on which reference may be made to the judgment of the Master of the Rolls in *Re Maclennan,* [1939] Ch. 750, at p. 757. It looked as though the testator was concerned with the amount to be found, in the first instance, by the trustees, rather than with the amount which would ultimately be left in the hands of the beneficiary. The testator was clearly contemplating a rise in the standard rate of tax and endeavouring to limit the liability of his estate in the event of his apprehensions being realised. Moreover, since all that was given to the beneficiary by the will was immunity from tax up to 5s. in the pound, it followed that, even if the beneficiary retained tax repaid in respect of his reliefs and allowances, he would never be left with more than the stated amount unless his own "effective" rate fell below 5s. So long as it did not, there could arise no such anomaly as that against which the rule in *Pettit's Case* was directed. The conclusion reached by the learned Judge was that, on the true construction of the will, the testator's intention was that immunity from tax up to a maximum of 5s. in the pound should serve simply as a factor in computing the amount of the annuity, with the result that no part of any tax repaid to the beneficiary need be accounted for to the trustees.

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7. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Lease under seal—parol promise of reduction of rent—enforceability.—*Central London Property Trust* v. *Hightrees House* (1946), 62 T. L. R. 557, is a landlord and tenant decision of Denning, J., upon the enforceability of an oral promise to reduce the rent payable under a lease by deed, and is in that respect a very important decision upon a question which is of widespread practical importance at the present day, but it also has wider implications affecting the law of contract generally, and should be studied as a leading case on the principles of contract law.

A lease under seal for a term of ninety-nine years reserved a ground rent of £2,500 a year. Under war conditions it became apparent that the lessee company could not pay the rent out of the profits, and after discussions the lessors wrote: "We confirm the arrangement made between us by which the ground rent shall be reduced as from the commencement of the lease to £1,250 per annum." Denning, J., was satisfied on the

evidence that the promise was known by all parties to apply only in respect of the conditions prevailing when the flats were only partially let due to the war and that it did not extend further than that. An action was brought to test the enforceability of this promise by claiming the difference between the rent originally reserved and the reduced rent for the two quarters ended September 29, 1945, and December 25, 1945, respectively.

It will at once be perceived that the promise to reduce the rent was not only an oral variation of a deed, but was entirely without consideration. This at once distinguishes the case from *Buttery* v. *Pickard* (1945), 62 T. L. R. 241, noted in *The Conveyancer,* vol. 10, p. 229. Here the lessee company contributed nothing more by way of consideration than an undertaking to pay a part of what it already owed, which was no consideration in law—see the Notes to *Cumber* v. *Wane* in vol. 1 of *Smith's Leading Cases,* p. 373, to which attention has already been drawn when discussing *Buttery* v. *Pickard.* Nevertheless Denning, J., held the promise to be binding, at any rate to the extent that the party making it could not be allowed to act inconsistently with it. The learned Judge began his examination of the position by referring to *Berry* v. *Berry,* [1929] 2 K. B. 316, as authority for the proposition that Equity allows a contract under seal to be varied or rescinded by a simple contract, by preventing the party who has agreed to the rescission or variation suing under the deed—but then there must be consideration for the simple contract. Then examining the position from the point of view of estoppel, the only representation here made by the lessors was as to the future, and that could not give rise to an estoppel: see *Jordan* v. *Money* (1854), 5 H. L. C. 185, where it was said that a representation as to the future must be embodied as a contract or be nothing.

But then Denning, J., went on to review developments in the law since *Jordan* v. *Money,* and the principle he laid down and applied can best be appreciated by a citation from his judgment: "The law has not been standing still since *Jordan* v. *Money.* There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases of promises which were intended to create legal relations and which, to the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the Courts have said that these promises must be honoured. There are three cases to which I particularly refer: *Fenner* v. *Blake,* [1900] 1 Q. B. 426, *Re William Porter and Co., Ltd.* (decided in 1937), and *Buttery* v. *Pickard,* [1946] W. N. 25. Those cases are not cases of estoppel in the strict sense. They are really promises—promises which were intended to be binding; on which the parties to whom they were made have acted; and on which the parties, in making them, must have known that the other party would act. The Courts in each case held the promises to be binding on the party making them, even though under the old common law it might be said to be difficult to find any consideration for them. The Courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them to act inconsistently with them. It is in that sense, and that sense only, that the promises give rise to an estoppel, similar to that which existed in *Hughes* v. *Metropolitan Ry.* (1877), 2 App. Cas. 439, at p. 448, *Birmingham and District Land Co.* v. *London and North Western Ry.* (1888), 40 Ch. D. 268, at p. 286, and *Salisbury* v. *Gilmore,* [1942] 2 K. B. 38, at p. 51. It is to be noticed that in paragraph 40 of the sixth interim report of the Law Revision Committee it was recommended that such a promise as I have referred to should be enforceable in law even though no consideration

had been given by the promise (*sic*). It seems to me that, to the extent which I have mentioned, that has now been achieved by the decisions of the Courts."

Denning, J., then pointed out that the conditions to which the promise was intended to apply had completely passed away by the early months of 1945, and held therefore that the reduction thereupon ceased to apply, expressing his final finding in these words: "I prefer to apply the principle that a promise, intended to be binding, intended to be acted on and so acted on, is binding so far as its terms properly apply. It is binding here as covering the period down to early 1945, and from that time full rent is payable."

The importance of this decision hardly needs to be emphasised. A closer examination of several of the cases upon which Denning, J., based his judgment is therefore merited. In *Fenner* v. *Blake* a yearly tenant of a Lady Day holding orally agreed in December that he would surrender at the following Midsummer. On the faith of this agreement the landlord, with the knowledge and assent of the tenant, sold the premises to a purchaser with the right to possession at Midsummer. The tenant having failed to give up possession at Midsummer, the landlord recovered in ejectment on the grounds: (1) that the agreement of December, although bad as an agreement to surrender for lack of writing, amounted to an acceptance of a new tenancy to end at Midsummer, thus working a surrender of the old one by operation of law; and (2) that the defendant by his conduct in allowing the plaintiff to contract an obligation to his purchaser on the faith of the agreement was estopped from disputing that his tenancy ended at Midsummer. Channell, J., in a judgment with which Bucknill, J., agreed, said: "It is an invariable practice, when a reversion is put up to auction, for the vendor to state what the terms of the tenancy are and when it expires; and if the tenant is communicated with before the sale and agrees that his tenancy is of such and such a character, and thereupon it is so described, and the sale takes place upon that footing, it is impossible to say that the tenant is not estopped from saying that the tenancy is other than that upon the footing of which he allowed the property to be sold to the purchaser."

In *Hughes* v. *Metropolitan Ry.* Lord Cairns expressed the matter in this way: "If parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." In *Birmingham and District Land Co.* v. *London and North Western Ry.* Bowen L.J., after reading the above quoted passage from Lord Cairns, said: "The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights, to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before." In *Salisbury* v. *Gilmore* those words of Bowen, L.J., were cited by MacKinnon, L.J., but the principle under discussion was not essential to the decision in that case.

When one bears in mind that in *Central London Property Trust* v.

Hightrees House the person to whom the promise was made only acted upon it to the extent of paying part of what he already owed under the lease, it will be seen that the principle has now been carried by Denning, J., to a point where it certainly gives much food for thought. If this decision is sound, a not inconsiderable breach seems to have been made in the traditional doctrine of consideration and a way found of enforcing a gratuitous promise to take part of a debt in lieu of the whole.
(Woodfall, 24th ed., pp. 325, 901; Smith's Leading Cases, vol. 1, p. 373.)

Validation of War-time Leases Act, 1944—*" at least one month's notice in writing given after the end of the war ".*—In *Alpine Rinks* v. *Lebel Products* (1946), 62 T. L. R. 596, Hilbery, J., had to decide a short point which arose under the Validation of War-time Leases Act, 1944.

A lease was granted " until such time as hostilities in which Great Britain was then involved or any extension thereof should cease . . . and for a period of six calendar months from the date of such cessation ". The effect of this limitation was, by virtue of the Validation of War-time Leases Act, to grant the lessees a term of ten years, subject to a right exercisable by the landlords or the tenants to determine the tenancy by at last one month's notice in writing given after such date as was the " end of the war " for the purposes of this lease; and the " end of the war " for the purposes of this lease was, by reason of section 1 (2) of the Act, six months after August 15, 1945, *i.e.,* February 15, 1946.

The notice which the lessors served was posted by registered post on February 13, 1946, received at the offices of the lessee company on February 14. But the receipt for the notice which was signed by the managing director and returned to the lessors was in these terms: " Received the notice, of which the above is a duplicate, this 16th day of February 1946." The notice directed the lessees to quit on March 16, 1946. Hilbery, J., found on these facts that the notice was not effectively served before the 16th, and on that finding the question whether it was " given after the end of the war ", or rather after the date which was under the Act the artificial " end of the war " for the purposes of this lease, did not arise. He expressed the view that the word " given " was not to be construed as meaning " served ", however, and that even had the notice been served on the 14th there was still a month's notice " given " after the date which was the " end of the war " for the purposes of the lease. " What is aimed at " he said, " by the language of the Act is that there should be a month's notice in writing to the person who is to be given the notice, but not that a month's notice cannot be served before that end of the war which is the artificial ending of the war by the operation of the provisions of the Act. What is aimed at, I think, and why that language is used, is to ensure that where the Act is applied the tenant shall be given a month's notice, and a clear month's notice, after the end of the war, and that, it seems to me, was effected by the plaintiffs, on either view."
(Woodfall Supplement No. 5, p. 6.)

Rent Restrictions Acts—Act of 1933, *First Schedule, para. (h)—greater hardship.*—In *Sims* v. *Wilson* (1946), 62 T. L. R. 485, the Court of Appeal has given guidance on a number of points arising in connection with " greater hardship " claims for possession under paragraph (h) of the First Schedule to the Act of 1933. That paragraph, as applied to 1939 Act control, enables an order for possession to be made if " the dwelling-

house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after September 1, 1939, for occupation as a residence for

(i) himself; or

(ii) any son or daughter of his over eighteen years of age; or

(iii) his father or mother:

Provided that an order or judgment shall not be made or given on any ground specified in paragraph (h) of the foregoing provisions of this Schedule if the Court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it".

In this case the Court of Appeal has laid down the following principles for guidance in claims under this paragraph:—

(1) Without deciding whether the offer of part of the house of which possession is claimed constitutes "other accommodation" within the meaning of the proviso, the fact that such accommodation is offered is one of the circumstances of the case which the County Court Judge can take into consideration.

(2) The burden is on the tenant to prove that greater hardship would be caused by granting the order or judgment than by refusing to grant it.

(3) The fact that if an order for possession is made the tenant will be obliged either to sell or store his furniture is one of the circumstances which the Judge is entitled to take into account, though how much weight should be given to it depends on the circumstances in each case.

(4) Future hardship may be taken into account (following *Bumstead* v. *Wood* (1946), 62 T. L. R. 272).

(5) The fact that any other accommodation available would not be protected under the Rent Restrictions Acts is a matter for the Judge to take into consideration along with the other circumstances, but the fact that such accommodation is not protected does not preclude the Judge from making an order under paragraph (h).

(6) Although a Judge might refuse to make an order unless the landlord (a) agreed that the tenant should have certain accommodation in the house, and (b) entered into a contract which would give the tenant the same protection as if he were protected under the Acts, the fact that the Judge does not put forward that suggestion does not constitute misdirection.

It is to be regretted that in one of the reports of this case the reporter appears to have confused "alternative accommodation", the expression used in section 3 of the 1933 Act, with "other accommodation", the expression used in paragraph (h) of the First Schedule. These expressions are kept quite distinct in the Acts, and Morton, L.J., is careful to preserve this distinction, but there is confusion in the headnote of the one report referred to. *Sims* v. *Wilson* is only concerned with the question of "other accommodation" within paragraph (h) of the Schedule, not with "alternative accommodation" within the main part of section 3 itself. It was long ago held that the offer to a tenant of part of the demised house might constitute suitable "alternative accommodation" within section 3 of the 1933 Act and the earlier provisions which that section replaced: *Thompson* v. *Rolls*, [1926] 2 K. B. 426. On the other hand, premises which are alleged to constitute suitable "alternative accommodation" should generally be either a controlled dwelling-house or premises "to be let as a separate dwelling" on terms which will afford reasonably

equivalent security of tenure: section 3 (3). But the question what may be comprised within "other accommodation" within the meaning of paragraph (h) of the Schedule is a different question altogether, and this appears clearly from the judgment of Morton, L.J., in this case.

The Court of Appeal also gave a reminder—and this applies to all kinds of appeals from the county court, where there is no shorthand note officially taken—that it is the duty of counsel, or of solicitors, in the county court to take a note of the judgment; if there is no written judgment and the Judge himself has not prepared a note of the reasons for his decision, counsel's note should be available for the use of the Court of Appeal, and an endeavour should be made to have an agreed note of the judgment.

(Rent Restrictions Guide, 2nd ed., p. 61.)

Rent Restrictions Acts—bankruptcy of protected tenant—no disclaimer by trustee in bankruptcy—tenant has no right to hold over as statutory tenant after expiration of tenancy.—In *Stafford* v. *Levy,* [1946] 2 A. E. R. 256, 62 T. L. R. 487, a protected tenant became bankrupt during the currency of his lease, but the trustee in bankruptcy did not disclaim the lease and permitted the bankrupt to continue to occupy the house. In due course the lease came to an end and thereafter the trustee did not claim any further interest in the house, but the bankrupt claimed to hold over as statutory tenant. On appeal from a decision of the Master refusing leave to defend proceedings for possession, it was held by the Court of Appeal that when the lease became vested in the trustee in bankruptcy all interest of the bankrupt himself in the house came to an end and therefore, being no longer the tenant when the lease ran out, he could not become a statutory tenant under the Rent Restrictions Acts. In such a case it is really immaterial whether the contractual tenancy comes to an end by disclaimer on the part of the trustee in bankruptcy, as in *Reeves* v. *Davies,* [1921] 2 K. B. 486, or by expiry of time as in *Stafford* v. *Levy. Sutton* v. *Dorf,* [1932] 2 K. B. 304, was really quite different, for there the bankrupt's contract of tenancy had come to an end before he became bankrupt (though the Court of Appeal in *Stafford* v. *Levy* pointed out that the statement of the facts in the Law Reports was defective in not making this point clear) and the decision in the case was that the statutory tenancy which the tenant had at the time he became bankrupt did not vest in the trustee in bankruptcy but was purely a personal right of his own.

(Rent Restrictions Guide, 2nd ed., pp. 13, 67.)

Rent Restrictions Acts—Act of 1920, *s.* 12 (1) *and* (3)*; Act of* 1938, *s.* 5*—apportionment to determine standard rent.*—In *Upsons* v. *Herne* (1946), 62 T. L. R. 527, the Court of Appeal went very carefully into the question when apportionment is the appropriate method of determining the standard rent of a controlled dwelling-house. The relevant sections of the legislation are (this having been a case of 1920 Act control) section 12 (1) of the Act of 1920, whereby "The expression 'standard rent' means the rent at which the dwelling-house was let on August 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said 3rd day of August the rent at which it was first let"; section 12 (3) of the Act of 1920, whereby "Where, for the purpose of determining the standard rent or rateable value of any

dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the Court as to the amount to be apportioned to the dwelling-house shall be final and conclusive"; and section 5 of the Act of 1938, whereby "Where a dwelling-house to which the principal Acts apply is part of another dwelling-house to which those Acts apply, the standard rent of the first-mentioned dwelling-house as from September 29, 1938, shall be a standard rent ascertained by apportioning the standard rent of the second-mentioned dwelling-house, and subsection (3) of section 12 of the Act of 1920 shall apply accordingly notwithstanding that the first-mentioned dwelling-house was let as a separate dwelling on or before the date on which the second-mentioned dwelling-house was let".

In *Upsons* v. *Herne* two flats and a shop which had always been wholly separate though all under one roof were let together under a single lease at a single rent from 1911 until a date after 1914. There was no intercommunication between the three tenements, each of which had its separate entrance. One of the flats, which had first been let separately in 1925, was let to the appellant in 1938. It had always been within the Rent Restrictions Acts, and the appellant now contended that its standard rent was to be ascertained by an apportionment of the sum at which the whole building had been let in 1914, and not by reference to the rent at which the flat had been first separately let in 1925. The Court of Appeal held that the standard rent of this flat fell to be decided by apportionment, as the flat, having been included in the lease of 1911, was accordingly (though then part of a larger letting) "let" within the meaning of section 12 (1) of the 1920 Act on August 3, 1914. The significant feature of this decision is that under the lease which was in force in 1914 what was demised was not a single controlled dwelling-house at all but an agglomeration of individual tenements. The fact that in this case they were all under one roof would appear to be merely accidental. The principle would apply just the same were the letting at the material date, *i.e.*, August 3, 1914, or (in the case of 1939 Act control) September 1, 1939, not three but a hundred tenements, and whether those tenements were all under one roof or were individual houses, shops, factories and so on. If the dwelling-house whose standard rent is now in issue is part of what was let on that date, and was itself first let separately after that date, it appears that its standard rent is to be determined by apportionment of the whole rent reserved under that letting, regardless of what the remainder of those premises comprised. This is a startling development, or perhaps we should say discovery. One or two examples based on 1939 Act control may be taken for the sake of illustration. If a large factory covering many hundreds of acres was let in 1939 to a motor manufacturing company together with an estate of new workmen's dwellings, the standard rent of, at any rate, such of those dwellings as were let for the first time separately after September 1, 1939, does not, it seems, depend on what the dwellings were first let for to the individual workmen, but on the rent reserved under the head lease for the entirety of the demised premises. If a large block of new flats was let in 1939 to the "A" company, who took the premises on lease as an investment and sublet to the occupying tenants at a profit, that profit may prove to be unlawful, since the standard rent of, at all events, any flat not let separately until after Sepember 1, 1939, is to be ascertained by a strict apportionment of the rent at which the entirety was let on September 1, 1939, to the "A" company. The only definite escape from this position seems to be where the rent reserved under the head lease

at the material date was less than two-thirds the rateable value of the property—Act of 1920, s. 12 (7).

One must, of course, be careful not to read into *Upsons* v. *Herne* more than was actually there decided. In that case, though the entirety was let on the date by reference to which the standard rent fell to be fixed, the individual flat was first separately let after that date, and in the examples suggested above care has been taken to take only cases where the individual dwelling was first let separately after September 1, 1939. It may be that the case of *Platman* v. *Frohman,* [1929] 1 K. B. 376, thought to be obsolete after the passing of section 5 of the Act of 1938, is not so obsolete as was thought, and still states the position correctly where the entirety contained in the "parent" letting subsisting on the relevant date is not a dwelling-house within the Acts. In that case Shearman, J., pointed out that it was not necessary to apportion the rent of the whole house if the rooms occupied by the tenant were shown to have been let separately on August 3, 1914. Where the rooms whose standard rent has to be determined are part of a larger dwelling-house to which the Acts apply, section 5 of the 1938 Act supersedes this decision. But apparently the principle of the decision still applies where the entirety comprised in the head lease is something other than a controlled dwelling-house. *Cole* v. *Harris,* [1945] K. B. 474, which involved an issue as to apportionment as well as the sharing point on which it is more usually cited, appears to illustrate this. In that case a house had not been let as a whole either on or since September 1, 1939, but had been let as a whole at a decontrolled rent of £75 per annum in 1936. A portion of it had been let in 1939 at 22s. per week, and the question arose whether the standard rent of that portion was 22s. per week or an apportioned part of £75 a year. It was held by the Court of Appeal that the standard rent of the part was 22s. per week—there was no necessity for apportionment to determine the standard rent as on September 1, 1939, the dwelling-house in question was let, whereas the house of which it forms part was not then let.

A number of earlier decisions were reviewed by the Court of Appeal in *Upsons* v. *Herne,* but considerations of space prevent a lengthy digression into the historical researches which guided the Court to its conclusion. It should, however, be mentioned that it was a dictum of Scott, L.J., in *Field* v. *Gover,* [1944] K. B. 200, which had previously kept the principle of apportionment within measurable bounds by confining it—as regards the ascertainment of standard rent—to cases where both the part and the whole were controlled dwelling-houses. This dictum has now been disapproved.

It would be a bold person who claimed thoroughly to understand the application of the apportionment provisions of the Rent Restrictions Acts. The latest statement of the position in *Upsons* v. *Herne* merits careful study by all readers of this journal, for some leaseholders of properties sublet at profit rentals as controlled dwelling-houses may conceivably find themselves in difficulties they had not anticipated.

(Rent Restrictions Guide, 2nd ed., p. 34.)

THE LIBRARY.

The Death Duties. By Robert Dymond. Tenth edition. 1946. London: Solicitors' Law Stationery Society. (£2 15s. net.)

Would-be owners of *Dymond on Death Duties,* who have been dismayed to learn that it was out of print, will be relieved by the appearance of a new Edition superseding that of 1942. Though the Death Duties legislation is not as voluminous as

the Income Tax Acts, and judicial decisions are—in the nature of the case—less numerous, there is, nevertheless, a formidable jungle to be hacked through, and Mr. Dymond has long since established himself as a reliable guide. The new Edition deals with the relevant legislation up to and including the Finance (No. 2) Act, 1945 and adds a summary of the changes in the law announced on the introduction of this year's Finance Act. The author also prints, with some useful explanatory comments, the text of the recent Convention on Death Duties between the United Kingdom and the United States. Among new matter of importance may be mentioned the amplification of the section dealing with transfers to privately controlled companies in the light of the alterations introduced by the Finance Act, 1944. The provisions on this subject of the 1940 Act, as amended in 1944, are complicated and, on a number of points, obscure. Pending their clarification by decided cases, of which, as yet, there are none, their construction not seldom presents serious difficulty to those called upon to advise on them, and there is every reason to be grateful to Mr. Dymond for his careful and detailed exposition. Another valuable section, also breaking new ground, is that concerned with the provisions of the 1940 and 1944 Acts with regard to the purchase of annuities from relatives and cognate topics. There is also a very useful discussion of the Killed in War Reliefs, which are explained in detail and illustrated, in the case of section 1 of the Death Duties (Killed in War) Act, 1914, by a table showing, in terms of the proportion of duty to be paid in various cases, the precise extent of the discount claimable in respect of property in excess of the £5,000 on which duty is remitted. Those who have used former editions—and who that is concerned with the subject has not?—do not need to be told that the work as a whole is a model of its kind and can be consulted in the confident expectation that the inquirer will find his question answered, and answered in language as clear as the subject-matter permits. In type and lay-out the Tenth Edition is a marked improvement on the Ninth, which was published under the difficult conditions prevailing in 1942.

L. J. S.

Rating Valuation Practice. By PHILIP R. BEAN, P.A.S.I., A.A.I., A.R.V.A., A.I.HSG, Chartered Surveyor and Associate Member of the Rating Surveyor's Association, and ARTHUR LOCKWOOD, M.B.E., F.S.I., F.R.V.A., F.I.HSG, Chartered Surveyor and Holder of the Special Diploma in Rating. London: Stevens & Sons, Ltd. 1946. pp. xvii and 220. (21s.; cloth.)

With a Foreword by Harold B. Williams, LL.D., Barrister-at-Law, this work sets out to furnish the student with a thorough grasp of the principles and practice of valuation and to provide a complete refresher course for those returning after an absence on war service. The book does in fact set out very clearly the principles and practice of rating valuation and contains a large number of useful practical examples which afford a clear picture of the various bases of valuation and the principles applied to different subject-matters. It can be recommended as a useful and well-arranged exposition of the subject.

L. A. B.

The Problem of Pre-War Contracts in Peace Treaties. By ERNST WOLFF. With a Foreword by Sir ARNOLD MCNAIR, K.C. London: Stevens & Sons, Ltd. 1946. pp. xii and 139. (12s. 6d.; cloth.)

This book deals with the treatment in peace treaties of contracts made before the war, and incomplete at the outbreak of war, between nationals of the parties to a peace treaty. The significance of this book lies in its timing, appearing as it does shortly before the assembly of the Peace Conference of 1946, and the fact that it comes from the pen of an eminent German jurist. In treating of the problems of the effect of war on contracts, Dr. Wolff specialises in that nebulous field between public and private international law with a sure touch which can come only from experience. The author presents many aspects and types of contract against the back-cloth of those treaty provisions of Versailles which established certain rules

governing the effect of war on contracts and the system of Arbitral Tribunals to administer them. He concludes by putting forward a number of constructive suggestions for the forthcoming peace treaty, some of which will not be entirely acceptable to English lawyers, *e.g.*, the proposal (p. 138 (15) (b)) that "*contracts concerning companies*" should be maintained. Written in the comparative method from the standpoint of Anglo-American law, this short book has a value and interest extending far beyond the immediate occasion of its appearance.

R. H. G.

The Law of Income Tax. By E. M. Konstam, K.C. Tenth edition. 1946. London: Stevens, and Sweet & Maxwell. pp. lxviii and 851. (£3 10s.)

The hard-pressed income tax practitioner harassed by the incessant flow of ever more complicated legislation, will extend a grateful welcome to the new edition—the Tenth—of Judge Konstam's standard work. How the author manages to keep pace with the bewildering procession of new Acts and new decisions is his own secret, but somehow or other he succeeds, and once again he has performed his periodical miracle. The new Edition provides a complete conspectus of income tax legislation down to and including the Finance (No. 2) Act, 1945, and contains some useful comments on the main provisions of that important Act—in particular, those concerning payments of interest by Local Authorities, refunds of Excess Profits Tax, and relief from double taxation. The Income Tax Act, 1945, is wisely reserved for separate treatment and forms the subject of a new and valuable chapter, in which the author struggles manfully—and not without a measure of success—to extract the meaning of language which he justly describes as "in the utmost degree tortuous and obscure". The twenty-two pages which he devotes to this topic are not sufficient for an exhaustive treatment of this singularly involved piece of legislation, but for those compelled to penetrate its mysteries they will provide valuable sign-posts on the way through the maze. Since the appearance of the Ninth Edition, the P.A.Y.E. code has been rounded off by the Employments Act, 1943, the Offices and Employments Act, 1944, and the Regulations made thereunder. Judge Konstam rightly refrains from any attempt to paraphrase this elaborate legislation or to comment upon it in detail, but by skilful selection and compression he has produced a clear and comprehensible summary of the scheme, in which the salient points are well brought out. The reported decisions have, as usual, been vigilantly watched, and the new Edition contains more than a hundred additions to the list of cases. One of the merits of Konstam on Income Tax is that the reader can consult the work on any topic with the comforting certainty that no relevant authority—old or new—will have been overlooked. The arrangement of the book—now familiar to all who are concerned with the subject—has been left substantially unchanged, and rightly so, for it could not well be improved upon. The author has shown his usual skill in weaving new matter into the text and earns the reader's gratitude for not requiring him to piece together fragments of the law for himself.

L. J. S.

The Modern Law Review. July 1946. London: Stevens & Sons. (6s.)

The *Modern Law Review*, as some of our subscribers may know, is not just another legal periodical giving the practitioner or student a digest of current and articles on everyday topics. This periodical aims at uniting the law with wider spheres of the social sciences. It contains notes on both statutes and cases, but these are selective and on the basis mentioned. So the statutes commented upon are the Furnished Houses, etc., Act, 1946, and the Supplies and Services, etc., Act, 1945, and Emergency Laws (T.P.) Act, 1946. These notes are designed to deal with their character and are very interesting. Two articles of considerable interest to the practitioner are The Law Reform (Contributory Negligence) Act, by Dr. G. L. Williams, and the Revival of Condoned Matrimonial Offences by Mr. R. Else Mitchell arising out of the decision of the Court of Appeal in *Beard* v. *Beard*, 61 T. L. R. 555, holding that condoned adultery was revived by desertion of less than three years.

The Construction of Deeds and Statutes. By Sir CHARLES E. ODGERS. Second edition. Sweet & Maxwell, Ltd. 1946. pp. xxi and 328. (£1 2s. 6d., boards; £1 5s., cloth.)

In producing a second edition of this book, Sir Charles Odgers is building on the fine reputation which his first edition (1939) has already achieved. The claim that it is merely to serve "*as an introduction to those who are beginning a study of the subject*" understates the value of the book to the general practising lawyer. The author's style bears every mark of mature writing: it is clear and well arranged, and gives interest to a difficult subject by historical touches and extracts from many of the fifteen hundred cases which are cited. This emphasis on the judicial function, particularly in the second part of the book dealing with the construction of statutes, is most useful from the point of view of the student. Sir Charles has no place for comparative theories of judicial interpretation of statutes, such as that of Gény, which he probably considers more appropriate to a work on jurisprudence. To the many up-to-date references which the author provides might be added two which appeared after publication of the book. In *Weatherley* v. *Weatherley,* [1946] 2 A. E. R. 1, Evershed, J., considered the report of the Gorrell Commission in the construction of "desertion" in the Matrimonial Causes Act, 1937; while the *dicta* of Lords Simonds and Uthwatt in *Adams* v. *Naylor,* [1946] 2 A. E. R. 241, may perhaps lead to legislation on the broad principle of the Crown's being affected by statutes.

Part I of the book, treating of the construction of deeds and other instruments, is concise and, within the limits imposed, remarkably comprehensive. Its most serious gap, which is apparently intentional, is the omission of a section on the construction of wills. This matter is only dealt with incidentally where cases involving such construction are of general application to other kinds of documents. There is an excellent section on the effect of parol evidence to vary written contracts, while Section X, on the individual parts of a deed, is the model of a concise essay on conveyancing practice. But one might question the use of the word "*lawful*" (the italics are the author's) in dealing with the covenant for quiet enjoyment (p. 118), when he writes, "*Under this covenant the grantee is entitled to have his estate free from all lawful disturbance by the grantor. . . .*" Since when could any act which is lawful be made the subject of complaint?

On the cover of the book the publishers state that, "*This is the only treatise dealing with the general principles of interpretation applicable to both deeds and statutes*". One might find fault with the word "*only*", and suggest its replacement by another adjective more appropriate to the high quality of the work.

R. H. GRAVESON.

London Building Law. By H. R. CHANTER, F.R.I.B.A. B. T. Batsford, Ltd. 1946. pp. x and 358. (£1 1s.; cloth.)

The law relating to building in London may well appear even to the lawyer, unless he has occasion specially to study it, a rather troublesome mass of statutes, schedules, by-laws, regulations and orders, not to mention common law rights and wrongs. The practitioner therefore, and particularly the student, may be pardoned if he feels somewhat daunted and baulked as he proceeds to delve into it, and it is one of the achievements of this work that the author gets rid of such inhibitions by, as it were, bringing the whole box of tricks from a dark cupboard and spreading it all out in the sunshine. The scheme and scope of the enactments is displayed by setting out the "arrangement of sections", so that the author is able in his Introductory Note to advise the reader to "make yourself familiar with the arrangement of sections adopted in each Act so as to retain a conception of the matters comprised therein, thus removing any mystery or bewilderment as to where any particular requirement is to be found".

The title page of the book describes it as for architects, surveyors, students, builders . . . and others concerned with the design, etc., of buildings in London, but it should certainly find a place on the shelves also of barristers and solicitors for it provides an invaluable code of the law relating to these matters. Moreover, the diagrams, plans and elevations which are placed alongside legal provisions in the text will help the lawyer also, by illustrating the purpose and effect of the legislation and by lighting up the law with a sense of practical reality.

LAWRENCE MEAD.

The Acts relating to Estate, Legacy and Succession Duties. By (the late) Alfred Hanson. Ninth Edition by Jackson Wolfe, LL.D., and Henry E. Smith, LL.B. 1946. Sweet & Maxwell, Ltd. pp. lvi and 784. (£3 10s. net; cloth.)

Hanson on Death Duties has long since established itself as a standard work, but the Eighth Edition, until recently the latest obtainable, was published as long ago as 1931, and it was high time for it to be brought up to date. The process of revision was begun some years ago but was interrupted by the war. It has now been completed, and the appearance of the Ninth Edition will be warmly welcomed by practitioners whose lot it is to wrestle with the intricacies and obscurities of the death duties. In the preparation of the new edition Mr. Jackson Wolfe has collaborated with Mr. Henry E. Smith of the Estate Duty Office—names which are a guarantee of thoroughness and reliability. To bring a work of this type up to date after a lengthy interval is a task making severe demands upon those who undertake it, but in this case it has been accomplished with conspicuous success. So great has been the accumulation of new legislation and new decisions since the Eighth Edition appeared that the notes relating to Estate Duty have had to be almost entirely rewritten. Those dealing with Legacy Duty and Succession Duty have not required such drastic treatment, but these, too, have been carefully revised and amplified. With the new edition appears the first of a projected series of Supplements, with the result that the main work, together with the Supplement, deals comprehensively with the whole of the relevant legislation now in force up to and including this year's Finance Act. Further supplements are to be issued from time to time as required. As is well known, *Hanson* differs from other works on the subject in dealing with it by way of text and commentary, while other authors prefer an arrangement by topics. Each method has its advantages and disadvantages, and there is room for both. Notes directly related to the words of the statutes can be of the greatest value to those called upon to construe them, and by its systematic treatment on these lines of the whole bewildering mass of Death Duties legislation *Hanson* renders, and renders most efficiently, an unique service.

L. J. Stein.

Kerr on Receivers. By F. C. Watmough, B.A., of the Middle Temple, Barrister-at-Law. Eleventh edition. London: Sweet & Maxwell, Ltd. 1946. pp. lii and 418. (£1 5s. net.)

This edition was published after the death of Mr. F. C. Watmough, but he had completed the revision. Mr. Watmough had already been responsible for the preceding five editions, and the work is so well known and the care and skill of the learned editor so appreciated that we are left with little but to record the appearance of this edition. The publisher's preface points out that the chapter on Appointment of Receivers Out of Court has been mainly rewritten and the chapter relating to Sequestration omitted. The appointment of receivers out of Court is so important that the fullest treatment available is certainly desirable. Users of the work will be glad to avail themselves of this new edition.

H. P.

Jackson & Gossett's Investigation of Title. By Edmond H. Bodkin, B.A., of Lincoln's Inn, Barrister-at-Law. Fifth edition. 1946. London: Stevens & Sons, Ltd. pp. lxxii and 455. (£2 2s.)

This is the first real new edition of *Jackson & Gossett* since the Property Legislation of 1925. The fourth edition was issued in 1922, the original edition being 1898. To one, like the writer, brought up on the book, such a delay in issuing an up-to-date edition may seem curious, but at least it has the advantage that time has been gained to see how the innovations have worked instead of prophesying how they should work.

The first thing that strikes the writer accustomed to the old book is that the requisitions are no longer printed in italics or inset. This may be an emergency measure, but we think it a pity. Secondly, it seems to us that some of the new "articles" are much longer than before. For example, under Settled Land, there is a summary in twenty-three pages of the new settlement of a legal estate, followed by only eight requisitions, a summary of registered titles in eleven pages, followed by four requisitions, and of mortgages in fourteen pages, followed by eleven requisitions. One of the great practical advantages of the older editions of this work were the very short headings (arranged alphabetically) of the points arising on titles and the number of common-form requisitions on the matter of the title. In view of the very condensed statement of the law, really in the form of "refreshers", the requisitions gave ready reference. We would suggest that a new edition would be improved by splitting up some of these longer titles and the addition of more requisitions which practice has indicated as likely to arise. So, for example, our experience indicates a number of further points which could be covered on settled titles. This particular title might also deal separately with the law before and after 1925. Questions on the old Settled Land Acts still constantly arise and it is much easier if the law on this point is dealt with separately under the old Acts when it comes to investigation of title. This is rendered the more necessary today because so many practitioners have been brought up under the new law and have made little or no thorough study of the old law.

It is peculiarly difficult in a work of this sort to ensure that any particular point will be covered under the heading studied. For example (at p. 336), the learned editor expresses a doubt whether trustees for sale can, without express power, purchase land with the proceeds of sale, and states the law laid down in *Re Wakeman,* [1945] 1 Ch. 177. This reference does not appear in the index nor under trusts for sale, where the doubt is expressed without reference to the case, which is given under tenants in common. Nevertheless, we think that this part of a difficult task has been well done.

We hope that this new edition augurs a further period of long life and usefulness.

H. P.

BOOKS RECEIVED.

Odgers' Pleading and Practice. Thirteenth Edition. Stevens & Sons, Ltd. pp. lxii and 446. (£1 10s., cloth.)

Harrison's Practical Epitome of Death Duties. Second (Consolidated) Supplement. 1946. Sweet & Maxwell, Ltd. pp. 15. (1s.)

Awards to Inventors. By J. P. GRAHAM, Barrister-at-Law. 1946. Sweet & Maxwell, Ltd. pp. x and 171. (21s.)

Woodfall's Law of Landlord and Tenant. Twenty-fourth Edition. Fifth (Cumulative) Supplement. 1946. Sweet & Maxwell, Ltd. pp. xv and 219. (12s. 6d.)

Small Traders and the Law. By H. ISON PORTER. 1946. Stevens & Sons, Ltd. pp. 112. (4s. 6d.)

Mews' Annual Digest, 1945. Edited by G. T. WHITFIELD HAYES. 1946. Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. (25s.)

Where to Look for Your Law. Ninth Edition. By R. HILARY STEVENS. 1946. Stevens & Sons, Ltd. pp. 285. (3s. 6d.)

Mayne's Treatise on Damages. Eleventh Edition. By Judge EARENGEY, K.C. 1946. Sweet & Maxwell, Ltd. pp. cxxiv and 696. (£3 3s.)